

No. 15238

United States
Court of Appeals
for the Ninth Circuit

WESTERN MACHINERY COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED
DEC - 3 1956
PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Cor-
poration,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COM-
PANY, a Corporation,

Defendant.

COMPLAINT FOR GOODS SOLD AND
DELIVERED

Complaining of Defendant, Plaintiff alleges:
For Its First Count:

I.

That Plaintiff is and at all times herein men-
tioned was a corporation duly organized and exist-
ing under and by virtue of the laws of the State of
Utah, and duly authorized to and doing business
as such foreign corporation in the State of Wash-
ington, and is a citizen and resident of the said
State of Utah.

II.

That Defendant is and at all times herein men-
tioned was a corporation duly organized and exist-
ing under and by virtue of the laws of the State of
Delaware, and is a citizen and resident of the said
State of Delaware, doing business in the District
aforesaid.

III.

That within 3 years last past, Defendant became indebted to Plaintiff for goods, wares and merchandise sold and delivered by said Plaintiff to said Defendant at Defendant's special instance and request, in the sum of \$71,038.71, which was and is the reasonable value thereof.

IV.

That notwithstanding due demand therefor has been made no part of said sum of \$71,038.71 has been paid, saving and excepting the sum of \$22,089.76, and that the balance thereof, to wit, the sum of \$48,948.95, is now due, owing, payable and unpaid from said Defendant to Plaintiff herein.

Wherefore, Plaintiff prays judgment.

For Its Second Count:

I.

That each and all the allegations contained in Plaintiff's foregoing paragraphs I and II are true, are hereby expressly referred to and made part of this, its second count.

II.

That within 3 years last past Defendant became indebted to Plaintiff for goods, wares and merchandise sold and delivered by Plaintiff to Defendant at Defendant's special instance and request in the sum of \$71,038.71, which said sum Defendant then and there promised and agreed to pay to Plaintiff therefor.

III.

That notwithstanding due demand therefor has been made no part of said sum of \$71,038.71 has been paid, saving and excepting the sum of \$22,089.76, and that the balance thereof, to wit, the sum of \$48,948.95, is now due, owing, payable and unpaid from said Defendant to Plaintiff herein.

Wherefore, Plaintiff prays judgment against Defendant in the sum of \$48,948.95, plus legal interest thereon, plus Plaintiff's costs incurred herein, and for all proper relief.

KARR, TUTTLE &
CAMPBELL,

By /s/ CARL G. KOCH;

SHAPRO & ROTHSCHILD,

By /s/ ARTHUR P. SHAPRO,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, and for amended answer to the first count of plaintiff's complaint admits, denies and alleges as follows:

I.

The defendant does not have sufficient informa-

tion to form a belief as to the truth or falsity of the allegations contained in paragraph I thereof, and therefore denies the same.

II.

The defendant admits the allegations contained in paragraph II thereof.

III.

The defendant denies the allegations contained in paragraphs III and IV thereof.

By way of affirmative defenses to the first count of plaintiff's complaint, the defendant alleges as follows:

I.

That if plaintiff sold or delivered any goods, wares or merchandise at the instance and request of defendant, defendant was not liable therefor, for the reason that there was no consideration running to defendant for the assumption of any liability for such sale or delivery of goods, wares or merchandise.

II.

Assuming, but without admitting, that defendant requested plaintiff to deliver goods, wares and merchandise, such request was on behalf of Bellingham Coal Mines Company, and any assumption by defendant of the obligation to pay for said goods, wares and merchandise was not in writing and comes within the statute of frauds.

III.

Assuming, but without admitting, that defendant became indebted to plaintiff for any sum whatsoever, plaintiff subsequently took a promissory note from the Bellingham Coal Mines Company covering such alleged indebtedness of defendant without reserving any rights against defendant, and the taking of said note resulted in a novation releasing defendant from any alleged obligation to plaintiff.

IV.

Assuming, but without admitting, that defendant became indebted to plaintiff for any sum whatsoever, defendant's liability, if any, was as a surety for the obligations of Bellingham Coal Mines Company, and that plaintiff's action of extending the time of payment for the Bellingham Coal Mines Company discharged and released defendant from any alleged obligation to plaintiff.

For amended answer to the second count of plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

In answer to paragraph I thereof, defendant expressly refers to and makes a part of this amended answer to said second count each and all of the admissions, denials and allegations contained in paragraphs I and II of defendant's foregoing amended answer to said first count.

II.

The defendant denies the allegations contained in paragraphs II and III thereof.

ties having been submitted by both parties and having been considered by the Court, and the Court having listened to argument of counsel and having rendered its oral opinion herein and the Court being fully advised in the premises, now makes and enters the following

Findings of Fact

I.

That plaintiff is, and at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and doing business as such foreign corporation in the State of Washington; that defendant is, and at all times herein mentioned, a Delaware corporation doing business in the State of Washington.

II.

That plaintiff sold and delivered coal-washing machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as plaintiff's Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in evidence as plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as

explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant.

III.

That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2.

IV.

That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant's assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1 and 2 was without consideration to defendant.

V.

That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum

of \$71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid \$15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of \$7,593.24, leaving \$48,445.47 unpaid.

VI.

That on or shortly before August 15, 1952, plaintiff requested from Bellingham Coal Mines Company a conditional bill of sale to the coal-washing plant. That prior to August 20, 1952, plaintiff renewed said request, and as an alternative suggested a chattel mortgage. Such conditional bill of sale or chattel mortgage were never given. On or about August 23, 1952, Bellingham Coal Mines Company transmitted to plaintiff by mail a promissory note dated August 20, 1952, Exhibit A-6, which plaintiff accepted. The Court finds that no additional consideration in fact was paid or received by defendant on account of, and that defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note.

VII.

That on or about the 23rd day of August, 1952, Bellingham Coal Mines Company delivered, and plaintiff accepted, a promissory note, Exhibit A-6,

covering the unpaid balance for said coal-washing plant; that by said promissory note, plaintiff extended to Bellingham Coal Mines Company, without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952.

VIII.

That at all times material hereto Earl R. McMillan was Manager of Coal Operations of defendant, and the only official of this company located in this state.

IX.

That at all times material hereto defendant was operating manager of Bellingham Coal Mines Company and Earl R. McMillan served as general manager, vice president and member of the board of directors of Bellingham Coal Mines Company.

X.

That on or about August 29, 1952, Bellingham Coal Mines Company by Earl R. McMillan, its general manager, certified that the installation of the coal-washing plant was complete and that it was operating satisfactorily.

Conclusions of Law

From the foregoing facts, the Court concludes:

I.

That the subject matter of the action and the parties hereto are within the jurisdiction of this Court.

II.

That plaintiff sustained the burden of proof to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of \$71,038.71 to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1, 2 and 4, for which sale defendant became a surety to plaintiff for the sum of \$71,038.71; that there is presently due and owing \$48,445.47 of the amount for which defendant was surety.

III.

That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952.

IV.

That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff's complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff.

V.

That defendant failed to sustain the burden of proof as to its second and third affirmative defenses to both first and second counts of plaintiff's complaint.

VI.

That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff's complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant's principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation defendant was a surety, thereby discharging the defendant from its obligation as surety.

VII.

That a judgment and decree should be entered herein, dismissing all counts of plaintiff's complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein.

Done in open Court this 22nd day of June, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

In the District Court of the United States for
the Western District of Washington, Northern
Division

[Title of Cause.]

Before: Judge Bowen.

Friday, June 15, 1956

COURT'S ORAL OPINION

The Court: In this case from a preponderance of the evidence the Court finds, concludes and decides as follows:

That of the four affirmative defenses pleaded by defendant against the plaintiff's complaint, each of which four affirmative defenses is alike and the same as to each of the two so-called counts of plaintiff's complaint, defendant has sustained its burden of proof as to the first of such affirmative defenses, in that there is no convincing evidence in this case that the defendant would have received any more money as a result of this contract than it would have received without a contract, and it is not established what sum or sums of money or the nature of what other profits would have or might have been sustained by this contract for the purchase and sale of machinery in addition to what the defendant might have received in the course of its relationship with the Bellingham Coal Mines.

That as to the second affirmative defense the defendant has failed to establish the same, there being undeniable evidence that the defendant by its cor-

porate official, Mr. McMillan, did in fact approve of the transaction in writing as appears in the lower left-hand corner of Plaintiff's Exhibit 1.

That as to the third affirmative defense the defendant has not sustained its burden of proof to establish the alleged novation, in that the Court is not convinced by any credible evidence that any consideration of any name or nature was offered to or received by defendant on account of, or that defendant consented or approved, the execution by Bellingham Coal Mines Company of the promissory note described in said third affirmative defense.

As to the fourth and last of said affirmative defenses, that the defendant has sustained its burden of proof, in that, as the Court is convinced and finds, concludes and decides from a preponderance of the evidence, it was at all times expressly understood that the contract for the purchase and sale of the machinery in question was for the account of and to be used by the Bellingham Coal Mines Company and not by the defendant Northwestern Improvement Company, and that in approving the express substitution of the defendant Northwestern Improvement Company for and in the stead of Bellingham Coal Mines Co., Inc., it was for the express purpose of, as clearly indicated by the testimony of both Mr. Huckaba for the plaintiff and by Mr. McMillan for the defendant, the sole accommodation and benefit of the Bellingham Coal Mines Company.

In this connection the Court is convinced by and finds from a preponderance of the evidence that as

a proximate result of the purchase and sale of this coal-washing machinery the defendant did not receive and was not expected to receive a single dollar of compensation or profit which it was not already entitled to receive. The commission of 20 per cent of the salary of Mr. McMillan and other employees of the defendant company for allocating part of their services to the coal operations of the Bellingham Coal Mines Company was not in any way increased or expected to be increased by reason of this purchase and sale contract, and there is no proof in the record that the defendant company profited or was to profit by any additional freight earnings which the Northern Pacific Railway Company might have received for the shipment of this coal-washing machinery.

I do not recall any evidence in this record on the question of ownership of the defendant or corporate relationship between the Northern Pacific Railway and the defendant.

Mr. Shapro: Oh, yes, your Honor, there is. May I interrupt just a moment?

The Court: Yes, you may.

Mr. Shapro: All of the exhibits that are on the letterhead of Northwestern Improvement Company have right under it printed there, "A subsidiary of Northern Pacific Railroad."

The Court: Very well. Then that letterhead statement is evidence of the fact that the defendant is a corporation owned by another corporation, the Northern Pacific Railway Company. One would infer from that, if any inference should be made

from the corporate relationship, that the Railway Company and not the Improvement Company would benefit by the mere fact of that relationship. Whatever earnings the subsidiary might make might in some way redound to the financial benefit of the Railway Company, but it does not follow that merely because the defendant Improvement Company is a subsidiary of the Railway Company that the subsidiary would receive some profits by some operations of the Railway Company. It would seem to be that the inference would be the reverse.

To that situation which the Court has stated the Court finds, as in effect is alleged in the fourth affirmative defense of defendant, amounted to nothing more than that by signing the contract the defendant thereby lent its name and credit for the benefit exclusively of the Bellingham Coal Mines Company is applicable the following language taken from the case of *Hoffman vs. Habighorst*, 28 Wash. 261, as the same is cited in the *Howell* case, 71 Fed. 2d 237, at 243:

“ ‘If a promise be made for the benefit of another, without sharing in the consideration, the promisor will be a surety, whatever may be the form of the agreement. * * *’ ”

The Court further so finds, concludes and decides that in reality the relationship between the defendant and Bellingham Coal Mines Company with respect to the purchase and sale of this machinery was one of suretyship; that the Bellingham Coal Mines Company was the principal, a fact well

known to all parties at all times material to this action, and all knew that the substitution on the contract of sale and purchase of the purchaser from the Bellingham Coal Mines Company to the defendant Improvement Company was for the sole benefit of the principal, the Bellingham Coal Mines Company, was without any consideration to the defendant company, and was in effect a pledging of the credit of the defendant company for the sole benefit of the Bellingham Coal Mines Company;

That the time extension by plaintiff for the payment by the principal of its debt to the plaintiff was effected by arrangement between the principal, the Bellingham Coal Mines Company, and the plaintiff without the consent or approval of the defendant, the surety, and that occurrence releases the defendant surety, the Northwestern Improvement Company, from whatever obligation it previously had to the plaintiff on account of the transactions alleged in plaintiff's complaint—a result which would not be changed even if defendant had been a compensated surety;

That plaintiff take nothing in respect to its first cause of action in its complaint filed herein February 9, 1956, and that it take nothing on account of its second cause of action in that complaint.

The Court by the words "cause of action" in each instance refers to what plaintiff denominates "Plaintiff's first count" in plaintiff's complaint and also to what plaintiff denominates its "second count" in its complaint.

And further the Court decides that said complaint

as to both of said counts and causes of action should be dismissed with prejudice and with taxable costs in favor of the defendant and against the plaintiff.

The Court's future calendar is so arranged that it is going to be very difficult to settle the Findings of Fact, Conclusions of Law and Judgment on a date later than the 22nd day of June. Today is the 15th. Can the prevailing party's counsel prepare and serve on opposing counsel their proposed Findings of Fact, Conclusions of Law and Judgment by Monday afternoon at the close of business?

Mr. Crosby: Yes, your Honor, that can be done.

The Court: Then if that is done the Court will give to counsel either the 20th or the 22nd to settle the Findings and Conclusions. Which do you prefer?

Mr. Shapro: The 22nd, may we have, your Honor?

The Court: It will be at ten o'clock in the forenoon.

Mr. Shapro: Thank you.

Mr. Crosby: Thank you, your Honor.

The Court: Counsel are excused until then and all the witnesses are excused.

[Endorsed]: Filed June 22, 1956.

United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Cor-
poration,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COM-
PANY, a Corporation,

Defendant.

JUDGMENT

This Matter having come duly and regularly on for trial before the undersigned Judge of the above-entitled Court on the 13th day of June, 1956, and the plaintiff being represented by Messrs. Arthur P. Shapro, of Shapro and Rothschild, and Carl G. Koch, of Karr, Tuttle and Campbell, its attorneys of record, and the defendant being represented by Roger J. Crosby, one of its attorneys of record, and thereafter, evidence, both oral and documentary, having been received and memorandum of authorities having been submitted by both parties and having been considered by the Court, and the Court having listened to argument of counsel and having rendered its oral opinion and the Court having signed and entered its Findings of Fact and Conclusions of Law herein,

Now, Therefore, It Is Ordered, Adjudged and

Decreed that all counts of plaintiff's complaint herein be, and the same are, hereby dismissed with prejudice; and

It Is Further Ordered, Adjudged and Decreed that the defendant, Northwestern Improvement Company, have judgment against the plaintiff, Western Machinery Company, for its costs and disbursements herein.

Done in open Court this 22nd day of June, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

Entered June 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Western Machinery Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Ap-

peals, Ninth Circuit, from the final judgment entered in this action on June 22, 1956.

Dated this 16th day of July, 1956.

SHAPRO & ROTHSCHILD and
KARR, TUTTLE &
CAMPBELL,

By /s/ CARL G. KOCH,
Attorneys for Appellant, Western Machinery Com-
pany.

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMISSION OF
ORIGINAL EXHIBITS

This Matter coming on for hearing in open court on the application of plaintiff for an order directing transmission of all exhibits admitted into evidence in the above cause to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal of the above cause, and it appearing to the court that plaintiff has filed its Designation of Contents of Record on Appeal designating for inclusion in the record all of said exhibits, now, therefore,

It Is Hereby Ordered that the clerk of the above-entitled court be and hereby is directed to transmit to the United States Court of Appeals for the Ninth

Circuit, as part of the record on appeal in the above cause, all of the exhibits admitted in evidence in said cause.

Done in Open Court this 20th day of July, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ COLEMAN P. HALL,
Of Karr, Tuttle & Campbell,
Attorneys for Plaintiff.

Approved as to Form:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

[Endorsed]: Filed July 20, 1956.

In the District Court of the United States for
the Western District of Washington, Northern
Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Cor-
poration,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COM-
PANY, a Corporation,

Defendant.

STATEMENT OF FACTS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable

John C. Bowen, one of the Judges of the above-entitled Court, at Seattle, Washington, beginning Wednesday, June 13, 1956, at 2:10 o'clock p.m.

The plaintiff was represented by Mr. Arthur P. Shapro, of Messrs. Shapro & Rothschild, Attorneys at Law of San Francisco, California, and Mr. Carl G. Koch, of Messrs. Karr, Tuttle & Campbell, Attorneys at Law of Seattle, Washington.

The defendant was represented by Mr. Roger J. Crosby, Attorney at Law of Seattle, Washington.

Whereupon, the following proceedings herein were had and done, to wit:

The Court: In the case entitled Western Machinery Co., a corporation, versus Northwestern Improvement Co., a corporation, No. 3878, are counsel and the parties ready to proceed with that trial?

Mr. Shapro: We are ready, your Honor.

Mr. Crosby: The defendant is ready, your Honor.

The Court: What arrangements have you for trial? Mr. Koch, are you going to be responsible for the trial, or do you ask that somebody else be?

Mr. Koch: I would like that Mr. Shapro be extended the privilege of participating in the trial by this Court.

The Court: I believe it has previously been stated in court that he is a member in good standing of the bar of the State of California.

Mr. Koch: Yes, your Honor.

Mr. Shapro: And of the Court of Appeals for the Ninth Circuit, your Honor.

The Court: What about the local trial Federal Court?

Mr. Shapro: Not in this District, your [2*] Honor.

Mr. Koch: In San Francisco.

Mr. Shapro: Oh, in San Francisco, yes, your Honor.

The Court: In other words, you are a member of the bar of the Northern District of California?

Mr. Shapro: With the Northern and Southern Districts of California and with the District of Nevada.

The Court: Your request is granted, Mr. Koch.

Mr. Koch: Thank you, your Honor.

The Court: And Mr. Shapro may act actively as a trial attorney in this case assisted by Mr. Koch if that is their wish. It would be in order at this time to hear plaintiff's opening statement. I will hear you from your present station.

Mr. Shapro: Your Honor, this action is one for goods allegedly sold and delivered by the plaintiff to the defendant Northwestern Improvement Company, the original sale having been made for the sum of \$71,038.71 on account of which there has been paid to the plaintiff the sum of \$22,089.76, leaving a balance on the purchase price for which this action is brought of \$48,948.95.

The facts, your Honor, very briefly, which we propose to prove in support of the allegations of our complaint are these:

On or about the 20th day of February, 1952, [3]

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

the defendant through the manager of its coal operations in this state, one Earl R. McMillan, gave to the plaintiff a written order for the purchase of certain equipment, which I think throughout this trial will probably be referred to for brevity's sake as a coal-washing plant, for the total sum originally of \$63,680, but which by reason of various changes in specifications and additions to the list ultimately together with freight and sales tax charges amounted to the \$71,000 figure mentioned by me a few moments ago. That written order given to the plaintiff by the defendant was confirmed in writing by the defendant through the same Mr. McMillan, manager of its coal operations, by a letter dated February 25, 1952, the written order dated February 20, 1952, having been delivered to the plaintiff on February 22, 1952. So far as the plaintiff is concerned the equipment in question was delivered in accordance with the written order of the defendant and it has not been paid for to the extent of the principal of the prayer of the plaintiff's complaint.

That, your Honor, in substance is the plaintiff's case.

The Court: The defendant at this time or, if it prefers, later on at a proper stage in the proceedings, may make defendant's opening statement [4] of what it thinks the proof will be.

Mr. Crosby: I would like to reserve my statement until the end of plaintiff's case.

The Court: That may be done.

Mr. Shapro: With the Court's permission, then, your Honor, the plaintiff will call as its first witness Mr. Stanley Huckaba.

The Court: Come forward and be sworn as a witness.

J. STANLEY HUCKABA

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shapro:

Q. Will you state your full name, sir?

A. J. Stanley Huckaba.

The Court: How do you spell the last name?

A. H-u-c-k-a-b-a.

Q. (By Mr. Shapro): Where do you reside, Mr. Huckaba?

A. In Spokane, Washington.

Q. And for how long have you lived in the State of Washington?

A. Approximately seven years.

Q. Addressing your attention to the year 1952, what was [5] your employment?

A. I was engaged by the Western Machinery Company as sales engineer for the northwest district and part of Canada.

Q. What then and now is your professional occupation? A. Professional occupation?

Q. Yes.

A. I'm a metallurgical engineer.

Q. During the year 1952, and addressing myself to the early part of that year, Mr. Huckaba, as you have stated you were employed by Western Machinery Company, did you have occasion to meet

(Testimony of J. Stanley Huckaba.)

and have any business transactions with Mr. Earl R. McMillan? A. Yes, sir.

Q. And where did those transactions or negotiations take place?

A. Generally in Mr. McMillan's office.

The Court: Where?

A. In the Smith Tower. 1012, I believe it is, Smith Tower.

Q. (By Mr. Shapro): In Seattle, sir?

A. In Seattle, Washington.

Q. In general will you tell the Court, please, the nature of the business transactions that you had with Mr. McMillan at that time? [6]

A. At any specific time are you referring to?

Q. In January and February of 1952.

A. They were regarding the sale of a coal-washing plant to the—which was to be installed at Bellingham, Washington.

Q. Did you subsequently make a written quotation and offer to sell the coal-washing plant in question? A. Yes, sir.

The Clerk: It will be Plaintiff's Exhibit No. 1.

(A two-page quotation dated February 20, 1952, was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Shapro): The bailiff, Mr. Huckaba, is presenting to you a document which purports to be a quotation in connection with certain equipment that is described therein and which document is dated February 20, 1952. Is the document which

(Testimony of J. Stanley Huckaba.)

you now hold in your hands the quotation made by you to Mr. McMillan and to which you have just testified? A. Yes, sir, it is.

The Court: Avoid leading.

Q. (By Mr. Shapro): Mr. Huckaba, referring your attention to the document, will you tell the Court, please, with what difference, if any, the document you hold in your [7] hands was first presented to Mr. McMillan?

A. Will you repeat your question, please?

The Court: Read it, Mr. Reporter.

(The reporter read the last question.)

The Court: Any kind of difference is referred to that pertained to that thing.

A. Well, the document was written to the Bellingham Coal Mines Company, Incorporated, and it is the plant that was sold subsequently, and——

The Court: To whom, if you know, was it sold?

A. Well, under my——

The Court: No, if you know the answer, state it. If you don't, don't state any answer. I don't want any explanation.

A. To the Northwestern Improvement Company.

Q. (By Mr. Shapro): Mr. Huckaba, was the signature of Mr. McMillan and the rubber stamp, "Northwestern Improvement Company, Manager of Coal Operations," which appears in the lower left-hand corner of both pages of the document you have in your hand, on the document when you first transmitted it to Mr. McMillan? A. No, sir.

Q. When did you receive the document, if you

(Testimony of J. Stanley Huckaba.)

recall, in the condition in which you now see it?

A. We had a discussion in Mr. McMillan's [8] office——

The Court: Could you just state exactly when it was? If you can, do it without discussion. Counsel will ask you a question that calls for discussion if he wishes.

A. I do not recall the exact date.

The Court: Can you fix it approximately with reference to any other date that you do know, or any other occurrence which you do know? If so, fix it in that manner.

A. Well, it was sometime after February 20, 1952, when I wrote my quotation that it was delivered back to me.

The Court: What kind of occasion was it associated with, if anything may be associated in your mind, with that delivery occurrence you have just mentioned? Did it happen with reference to your doing anything or being anywhere at any time?

A. Yes, I was in Seattle at that time specifically to call on Mr. McMillan.

The Court: Was that the very next time after the first one you mentioned or was it not the first time?

A. No, it was not the first time. I had made a number of calls on Mr. McMillan prior.

The Court: How much time, about, elapsed, [9] if you know, between the two occasions you have mentioned, first the one when you first called on

(Testimony of J. Stanley Huckaba.)

Mr. McMillan in this matter and the second when you received from him this exhibit?

A. Well, as I recall it was a matter of months between the time I first called on Mr. McMillan in regard to this specific case and the time the order was placed.

The Court: You may inquire.

Q. (By Mr. Shapro): Mr. Huckaba, the quotation that you hold in your hand dated February 20, 1952, was given or sent to Mr. McMillan when?

Mr. Crosby: I object to that as leading.

The Court: That is leading and the objection is sustained because of it.

Q. (By Mr. Shapro): When if you know was the quotation dated February 20, 1952, which you hold in your hand delivered or transmitted to Mr. McMillan by you?

A. I do not recall the exact date it was given to him.

The Court: I think the question would call for giving your best information.

A. Within a day or two after the quotation was written I'm sure it was delivered to Mr. McMillan.

The Court: You may inquire.

The Clerk: Plaintiff's Exhibit No. 2. [10]

(A letter dated February 25, 1952, from Earl R. McMillan to Western Machinery Co. was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Shapro): Referring your attention

(Testimony of J. Stanley Huckaba.)

for a moment again, Mr. Huckaba, to Plaintiff's Exhibit No. 1, the question, will you observe the rubber stamp in the upper right-hand corner and tell the Court if you know the meaning of that date in the position in which it is on that document?

A. Well, the rubber stamp is evidently the stamp of Western——

The Court: No, it is what you know it to be. What significance does it have on there, is the import of his question.

A. It means it was received by Western Machinery Company on a certain date, February 25, 1952, in their office in San Francisco.

Q. (By Mr. Shapro): Now, Mr. Huckaba, referring your attention to Plaintiff's Exhibit No. 2, which purports to be a letter on the letterhead of Northwestern Improvement Company addressed to Western Machinery Company dated February 25, 1952, do you recognize that document?

A. Yes, sir, I do.

Q. Was it received by you in the Spokane office of Western Machinery Company? [11]

A. It was mailed to me in the Spokane office, yes.

Q. And received there by you?

A. Yes, sir.

Q. And does that document refer by description only to the subject matter of Plaintiff's Exhibit No. 1? A. Yes, sir.

Mr. Shapro: Your Honor, at this time for the record we offer and ask that they be received in

(Testimony of J. Stanley Huckaba.)

evidence as Plaintiff's exhibits both Items 1 and 2.

Mr. Crosby: I have no objection.

The Court: Each of them is now admitted.

(Plaintiff's Exhibits Nos. 1 and 2 for identification were admitted in evidence.)

The Court: Mr. Huckaba, what do you call Plaintiff's Exhibit 2? Does it have a name that reasonably reflects the contents of the document, Plaintiff's Exhibit 2? What do you call it, the shortest name you can think of that reflects the nature of the contents?

A. A letter confirming the order placed on February 20th.

The Court: That is sufficient.

Q. (By Mr. Shapro): Mr. Huckaba, do you know of your own knowledge that the equipment described in Plaintiff's Exhibits 1 and 2 was delivered to the Bellingham Coal [12] Mine at Bellingham, Washington?

A. Yes, sir, it was delivered and placed in operation.

Q. Referring your attention to the amounts of money referred to in both Exhibits 1 and 2 and by reason of your familiarity which you testified to as a metallurgical engineer, with the subject matter thereof, was the purchase price or sales price as indicated in Exhibits 1 and 2 at that time in your opinion fair and reasonable? A. Yes, sir.

The Court: How much was the sale price, Mr. Huckaba, the total sale price that you expected the

(Testimony of J. Stanley Huckaba.)

buyer to pay to your principal, Western Machinery Company? A. The sum was \$63,680, no cents.

The Court: 63 thousand——

A. \$63,680 and no cents.

The Court: Any may I refer to that as the total sales price which you expected to receive or contracted to receive?

A. At that time, yes.

The Court: You may inquire.

Q. (By Mr. Shapro): Mr. Huckaba, do you know of your own knowledge whether or not there were any additions to the equipment specified in Exhibits 1 and 2? [13]

A. Yes, sir, there were two additions.

Q. And can you tell the Court in general the nature of the additions?

A. There were two spirals or coal dewatering devices sold after that time. I believe——

Q. And——

The Court: Just a moment.

Mr. Shapro: Excuse me.

The Court: Two what, now?

A. Coal dewatering, spirals.

The Court: Is that one or more than one?

A. It would be two items.

The Court: Two items of——what do you call them?

A. I called them coal spirals. They are called dewatering devices.

The Court: Dewatering spirals, is that right?

A. Yes, that's right, coal dewatering spirals.

(Testimony of J. Stanley Huckaba.)

The Court: And then were there any other additions or are those the two additions you meant?

A. Well, there were supplies also sold to the—sold thereafter, which I presume is—excuse me—which must have been added to the total to make the total price. [14]

Q. (By Mr. Shapro): Do you recall, Mr. Huckaba, the sales price of the two dewatering spirals to which you have referred?

A. I do not.

Mr. Shapro: At this time, Mr. Crosby, may I ask if there is any question or contention so far as the defendant is concerned as to the amount of the original sale and the amount of the payments received and the balance?

Mr. Crosby: I don't believe so, except that I think that we should introduce a short accounting showing the sale price, and——

Mr. Shapro: The invoices will come in. I merely wanted to go into that while this witness is here if there was any question because he is the one who can tell us. So far as the figures are concerned we have the details.

Mr. Crosby: No, I don't think there will be any question about the amounts.

Mr. Shapro: I have no further questions, your Honor, of this witness.

The Court: Is there any cross-examination?

Mr. Crosby: Yes, your Honor.

The Court: You may proceed with that. [15]

(Testimony of J. Stanley Huckaba.)

Cross-Examination

By Mr. Crosby:

Q. Mr. Huckaba, approximately how many times did you come to Seattle and talk to Mr. McMillan prior to February 22, 1952, that is, talk to Mr. McMillan in connection with the machinery which was to be placed in the Bellingham Coal Mine?

A. I don't recall the exact number, but it was several times.

Q. Several times. And during those times isn't it true that you were advised by Mr. McMillan that the Bellingham Coal Mine Company was a separate company from the Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object to that question upon the ground that it is incompetent, irrelevant and immaterial and that it is an attempt to violate the parol evidence rule and to vary the terms of a written instrument by parol.

The Court: I don't think it is within the scope of the direct examination. If he wishes to make this witness his own witness, that might be another matter.

Mr. Crosby: Your Honor, this witness testified that the machinery was delivered to the Bellingham Coal Mine Company. [16]

The Court: Then the Court's statement was inappropriate, was inaccurate, and the objection is overruled. As to what the agreement may be, your

(Testimony of J. Stanley Huckaba.)

objection may be good. I don't know about that yet.

Q. (By Mr. Crosby): Do you have in mind the question, Mr. Huckaba?

The Court: Read the question, if unanswered.

(The reporter read the last question as follows:

“Q. And during those times isn't it true that you were advised by Mr. McMillan that the Bellingham Coal Mine Company was a separate company from the Northwestern Improvement Company?”)

A. That's correct.

Q. (By Mr. Crosby): And weren't you also advised that the Northwestern Improvement Company had been employed by the Bellingham Coal Mine Company to manage and operate the Bellingham Coal Mine at Bellingham, Washington?

Mr. Shapro: The same objection, your Honor.

The Court: That objection is overruled.

A. I had been told they were employed to manage the company. Under what conditions I wasn't informed.

Q. (By Mr. Crosby): You were also aware, were you not, [17] that the Bellingham Coal Mine Company had to give its approval of the purchase of this equipment?

Mr. Shapro: I object to that question, if your Honor please, upon the ground that it is not within the scope of the direct examination, calls for the

(Testimony of J. Stanley Huckaba.)

opinion and conclusion of the witness, is incompetent, irrelevant and immaterial.

Mr. Crosby: Your Honor, this witness stated that the machinery was sold to the Northwestern Improvement Company. I wanted to bring out that this witness was fully aware that the sale was actually to the Bellingham Coal Mine Company.

Mr. Shapro: That, your Honor, is a conclusion of law. That is the very issue your Honor is going to have to pass upon at the conclusion of this case.

The Court: The objection is overruled.

A. The question again, please.

The Court: Read the question.

(The reporter read the question as follows:

“Q. You were also aware, were you not, that the Bellingham Coal Mine Company had to give its approval of the purchase of this equipment?”)

A. I do not recall. [18]

Mr. Crosby: Mr. Shapro, might I have Mr. Huckaba's sales report of January 23, 1952, and the sales report of February 16, 1952?

Mr. Shapro: February 16, '52 (handing paper to Mr. Crosby). What is the other date, sir?

Mr. Crosby: January 23, 1952, marked “Received January 25, 1952.”

Mr. Shapro: I have it (handing paper to Mr. Crosby).

Q. (By Mr. Crosby): Mr. Huckaba, also didn't you consider attending a Board of Directors meet-

(Testimony of J. Stanley Huckaba.)

ing of the Bellingham Coal Mine Company for the purpose of explaining their purchase of this equipment?

Mr. Shapro: To which question we object, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, calls for the opinion and conclusion of the witness.

The Court: That objection is overruled. If you can answer, do so.

A. Under the duties of my job—I do not recall the specific instance, but under the duties of my job at that particular time I would have attended a meeting had they asked me to.

The Clerk: Defendant's No. A-1.

(A sales report, dated January [19] 23, 1952, was marked Defendant's Exhibit No. A-1 for identification.)

Q. (By Mr. Crosby): Mr. Huckaba, would you please refer to Defendant's Exhibit A-1 and advise the Court what that is?

A. This is a sales report form supplied me by the company whose employ I was then in upon which we wrote our reports and sent them in to San Francisco.

Q. That report is dated January 23, 1952?

A. That is correct. Received——

Q. And the writing on the form was made by you? A. That is correct.

Q. Would you please read the last paragraph of that report?

(Testimony of J. Stanley Huckaba.)

The Court: It is not in evidence.

Mr. Shapro: No.

The Court: You cannot do that yet. Did anyone sign it, Mr. Huckaba?

A. Pardon?

The Court: Did anyone sign that paper, Defendant's Exhibit A-1, the sales report you just mentioned?

A. It's signed by myself, yes.

Q. (By Mr. Crosby): This report pertains, does it not, to the equipment that you have been testifying about on the stand? [20]

A. I do not believe it does.

Q. Wasn't this report made in connection with your negotiations with Mr. McMillan?

A. In connection with my negotiations with Mr. McMillan during which several quotations were made.

Q. Yes. Pertaining to the coal washing equipment which was to be installed in the Bellingham Coal Mine?

A. During the process of the selling of the equipment a number of discussions were had and a number of quotations were made. Just how many, I—

The Court: What do you mean by "a number of quotations"? Do you mean about the same merchandise or contemplated sale of merchandise?

A. Not about the same merchandise, but the size of the equipment. In the planning of their plant we made recommendations and prices of a

(Testimony of J. Stanley Huckaba.)

number of different sizes or styles of equipment.

Q. (By Mr. Crosby): But all of this equipment was to be coal washing equipment, was it not?

A. That is correct.

Mr. Crosby: I would like to offer Defendant's A-1 in evidence.

Mr. Shapro: To which offer, your Honor, we object upon the ground that no proper foundation is laid.

The Court: The objection is sustained in [21] view of the statement that he didn't think it referred to the property which is mentioned in Plaintiff's Exhibits 1 and 2. That is what I understood him to mean to say.

(Defendant's Exhibit No. A-1 for identification was refused.)

Q. (By Mr. Crosby): During January and the first part of February, 1952, Mr. Huckaba, weren't you trying to sell coal washing equipment to be installed in the Bellingham Coal Mine?

A. That was one of my duties, yes, sir.

Q. And weren't you advised by Mr. McMillan that he would have to obtain authority from the Bellingham Coal Mine Company for the ordering of any equipment?

Mr. Shapro: I object to that on the grounds it has already been asked and answered.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

(Testimony of J. Stanley Huckaba.)

The Court: The objection is overruled.

A. I do not recall.

Q. (By Mr. Crosby): There was only one type of equipment that you were trying to sell to be placed in the Bellingham Coal Mine, isn't that correct? There may have been different sizes but there was only one type of equipment and the equipment was to have only one [22] purpose, isn't that correct?

A. That's correct, I believe, referring specifically to the coal washing plant, yes.

Q. Yes. So that this sales report of January 23, 1952, pertained to the same type of equipment or the type of equipment which you were trying to sell for installation in the Bellingham Coal Mine, isn't that correct?

Mr. Shapro: I object to that question, your Honor, upon the ground it has been asked and answered. The witness has already said no.

The Court: The objection is overruled.

The Witness: Read the question again, will you, please?

The Court: That will be done.

(The reporter read the last question.)

A. It pertains to the same type of equipment, yes.

Mr. Crosby: I now offer Defendant's Exhibit A-1 in evidence, as the witness has stated——

The Court: I heard his testimony.

Mr. Shapro: Your Honor, I object to the in-

(Testimony of J. Stanley Huckaba.)

roduction of Exhibit A-1 in evidence upon the ground that no proper foundation laid, that it is incompetent, irrelevant and immaterial, and that the document is merged, this being a contract dated February 20th, this [23] document being dated January 23rd, it is immaterial to the issue because it is merged in the written instrument which is dated subsequently to it.

The Court: Is there any other objection you have, such as not the specific property that was intended to be sold?

Mr. Shapro: Oh, yes, that is the basis of my saying that it is incompetent, irrelevant and immaterial, your Honor.

The Court: I wish you would be more particular. I don't think you should rely upon that phrase. We do not do that. I do not think that is a very highly respected phrase in Seattle, it is too broad.

Mr. Shapro: Your Honor, I will be very glad to accommodate myself to your Honor's suggestion, but I do want to make my objection.

The Court: What do you have in mind?

Mr. Shapro: I have two grounds of objection. First, the witness' testimony that this is of the same general type, taken in conjunction with his previous testimony that it is not the same size equipment or is not the same equipment as is described in Plaintiff's Exhibits Nos. 1 and 2, lays no proper foundation for the introduction of Exhibit A-1 in evidence by the defendant. Furthermore, since it represents, as he has [24] testified,

(Testimony of J. Stanley Huckaba.)

a part of his report of negotiations leading up to the document which has been admitted as Plaintiff's Exhibit 1 and also the confirmation, Plaintiff's Exhibit No. 2, and was dated and executed prior to that date, it must as a matter of law be deemed as negotiations merged in the subsequent contract and as such is not admissible.

The Court: The objection is sustained. Proceed. I do not wish to delay the proceedings. Go right ahead.

The Clerk: Defendant's Exhibit No. A-2.

(A two-page sales report, dated February 16, 1952, was marked Defendant's Exhibit No. A-2 for identification.)

The Court: I wish you to expedite the questioning. It is dragging, according to my feeling about it.

Q. (By Mr. Crosby): Mr. Huckaba, referring again to Defendant's A-1, isn't it true that you wrote a note on A-1 which pertained to Mr. McMillan's authority in connection with the ordering of machinery to be placed in the Bellingham Coal Mine Company?

Mr. Shapro: Your Honor, I object to that question upon the ground the document has been refused admission in evidence and therefore its contents is not [25] the proper subject of the question.

The Court: Read the question.

(The reporter read the last question as follows:

(Testimony of J. Stanley Huckaba.)

("Q. Mr. Huckaba, referring again to Defendant's A-1, isn't it true that you wrote a note on A-1 which pertained to Mr. McMillan's authority in connection with the ordering of machinery to be placed in the Bellingham Coal Mine Company?")

The Court: That objection is overruled. Look at the document, if you wish to look at it, A-1. Is that the one you refer to?

Mr. Crosby: Yes, that's the one.

The Court: Did you refer to A-1?

Mr. Crosby: Yes, I did, your Honor.

The Court: Let the witness see it. Read the question, Mr. Reporter.

(Defendant's Exhibit No. A-1 was handed to the witness. The reporter reread the last question.)

A. That's correct.

Q. (By Mr. Crosby): Isn't it true that that note pertained [26] to his general authority even up through your preparation of Plaintiff's Exhibit No. 1?

Mr. Shapro: To that question, your Honor, we object upon the ground it calls for the opinion and conclusion of the witness.

The Court: The objection is sustained, and I think you better call a witness as a part of the defendant's case in chief. I do not think the Court over objection will permit any further cross ques-

(Testimony of J. Stanley Huckaba.)

The Court: I presume the question is still addressed to Exhibit A-2?

Mr. Crosby: Yes.

The Court: I see that Counsel have not conducted a pretrial procedure. We will just excuse everybody here and have a pretrial procedure. We are just wasting time here and I don't approve of it at all. How many more exhibits are you going to show this witness that he hasn't seen until today?

The Witness: Not for a number of years, I [29] haven't, your Honor, I haven't seen——

The Court: Mr. Crosby, how many more exhibits do you have here that you are going to fool away a lot of time on?

Mr. Crosby: I have one more, your Honor.

The Court: Is that all, one more?

Mr. Crosby: Yes, in addition to—so that there will be three in all.

The Court: You already have A-1, A-2 and A-3 marked. Are those the ones?

Mr. Crosby: Those are the ones, your Honor.

The Court: And there is no other that you are going to deal with in respect to this witness' cross-examination, is that right?

Mr. Crosby: That's right, your Honor.

The Court: All right, you may proceed and finish, but do so expeditiously.

Mr. Crosby: If it would expedite matters, your Honor, I would——

The Court: We are going to have a pretrial proceedings in this case but we are going to finish

(Testimony of J. Stanley Huckaba.)

with this witness. I want to finish with this witness and these exhibits now. Proceed.

Q. (By Mr. Crosby): Mr. Huckaba, referring now to both Defendant's Exhibits A-2 and A-3, isn't it true that [30] A-3 is the same as A-1 and A-2, that they were prepared by you, sales reports to be submitted to your San Francisco office?

A. Correct.

Q. And signed by you? A. Yes, sir.

Q. And isn't it true that there are notations on A-2 and on A-3 pertaining to sale of equipment to be placed in the Bellingham Coal Mine?

A. They were relative to the sale, A-2 and A-3, but I see no reference to equipment.

Q. They are relative to the sale?

A. Relative to the pending sale, yes.

Q. That's right, which culminated in your preparing Defendant's Exhibit No. 1, which is a quotation—

Mr. Shapro: Plaintiff's.

Q. (By Mr. Crosby): Or Plaintiff's Exhibit No. 1, which is a quotation? A. Correct.

Q. Isn't it true that there are notes on those exhibits which indicate that the Bellingham Coal Mine Company had to approve the purchase of the equipment which was to be placed in the Bellingham Coal Mine?

Mr. Shapro: I object to that question, your Honor, upon the ground it calls for the opinion and [31] conclusion of the witness.

The Court: Read the question.

(Testimony of J. Stanley Huckaba.)

(The reporter began reading the last question as follows:

“Q. Isn't it true that there are notes on those exhibits which indicate that the Bellingham Coal Mine Company * * *”)

The Court: The objection is sustained. Ask him whether or not there are any notes on there without his interpreting them.

Q. (By Mr. Crosby): Did you place any notes on Defendant's Exhibits A-2 and A-3 which pertain to the Bellingham Coal Mine Company considering passing upon the purchase of equipment which you were endeavoring to sell through Mr. McMillan?

Mr. Shapro: I object to that question on the ground that it calls for the opinion and conclusion of the witness.

The Court: The objection is sustained. You may ask him if he wrote any note on there. The note speaks for itself, if he wrote one on there, as to what it means, and so forth.

Q. (By Mr. Crosby): All of the writing on these exhibits, A-1 and A-2, were placed there by you, isn't that true? [32]

A. No, sir. There's considerable writing on here that's not mine.

Q. Pardon me. Except for the stamp up in the upper right-hand corner, the rest of the form was prepared by you?

A. Well, there are various notes made on here by the San Francisco office as to where it should

(Testimony of J. Stanley Huckaba.)

go to and so forth, but essentially all of it's my writing, yes, that's right.

Q. All right.

Mr. Crosby: I would like to offer in evidence Exhibits A-1 and A-2.

Mr. Shapro: To which offer, your Honor, we object upon the ground that no proper foundation has been laid, and upon the further ground that by the answer of the witness to the question propounded by Counsel that the notes, A-1 and A-2, the reports culminated in the sale which is recorded in Plaintiff's Exhibits 1 and 2, we have the same ground, namely, that it was merged in the written instrument of a later date and, therefore, it would be a violation of the parol evidence rule to admit it.

The Court: The objection is sustained. The Court believes Counsel should prove his own case by his own witnesses in his own way. There is another reason [33] why the Court makes this ruling at this time. I do not think Counsel has established admissibility.

Q. (By Mr. Crosby): Mr. Huckaba, you made several trips, did you not, to Bellingham and visited the Bellingham Coal Mine Company?

A. Yes, sir.

Q. And isn't it true that you understood that the equipment shown on your quotation sheet, which is Plaintiff's Exhibit No. 1, you understood that the equipment was to be placed in the Bellingham Coal Mine that you visited?

(Testimony of J. Stanley Huckaba.)

A. That's correct.

Q. Approximately how many trips did you make to the Bellingham Coal Mine?

A. At least ten during the course of the sale and the installation of the equipment and placing the equipment in operation, ten or more.

Q. Were you ever told by Mr. McMillan that the Northwestern Improvement Company was to pay for the equipment shown on Plaintiff's Exhibit 1?

Mr. Shapro: Your Honor, we object to that question upon the ground that it calls for hearsay, is a violation of the parol evidence rule, it is an attempt to vary the terms of a written instrument by parol. The order and the acceptance and the confirmation [34] are all with Northwestern Improvement Company and call for payment by them.

The Court: What have you to say on that, Mr. Crosby?

Mr. Crosby: Your Honor, the plaintiffs here have introduced Exhibits 1 and 2 showing or purporting to show that certain equipment was ordered by the Northwestern Improvement Company, and this witness stated that the equipment was sold to the Northwestern Improvement Company, and I have asked this witness if he was ever told by Mr. McMillan, with whom he was dealing, that the Northwestern Improvement Company intended to pay for this equipment.

The Court: The objection is sustained, on the ground that if Mr. McMillan intended that he

(Testimony of J. Stanley Huckaba.)

should have written that name in there instead of what he did write.

Q. (By Mr. Crosby): Did you ever discuss terms of payment with Mr. McMillan?

Mr. Shapro: The same objection, if your Honor please. It's all merged in the written order.

The Court: The objection is sustained. Mr. Crosby, if you fix the time and if it happened that these men did something or that their conduct was in some way amendatory of the contract or if later than [35] the date of the contract these men made some agreement, you can show that, but so far as these preliminary negotiations that merged into this contract are concerned, whenever the objection is on that ground and if it truly applies, that objection does, to the circumstances, the Court will sustain it. You needn't take up your time or the Court's time. Just make an offer of proof and let the Court pass upon it now and make your record, if you want to do so, and let's not waste all this time.

Mr. Crosby: I have no further questions, and I would like to pass for the moment the offering of Defendant's A-2 and A-3.

The Court: Very well.

Mr. Shapro: We have no redirect, your Honor.

The Court: The witness may step down.

(Witness excused.)

The Court: Now, before we proceed further, we are now going to have an interruption of this trial

on the merits to proceed with a pretrial proceeding. I wish the plaintiff to bring out every exhibit, everything in the way of physical evidence which he intends to offer or which he may possibly offer, and exhibit it to opposing Counsel to see what his attitude is about your using it as evidence in this case and so he [36] will know what it is, and then after you have done that I wish your opponent to do the very same thing. I wish him to bring out every piece of paper, every physical thing that he intends to offer as an exhibit and display it to opposing Counsel and advise him of what he intends to do with it, and then if there is any question about any of it I wish to have it marked tentatively with the clerk's identifying mark.

Mr. Shapro: I understand, your Honor. I just want your Honor to know what I'm sure Mr. Crosby does, too. I have previously exchanged copies of the documents. What we haven't done heretofore is to advise each other those of the documents which we propose to offer in evidence.

The Court: Then will you proceed to do that now?

Mr. Shapro: Yes, your Honor.

The Court: Each of you.

Mr. Shapro: Yes, your Honor.

The Court: Court will be at recess subject to call.

Mr. Koch: Your Honor, may Mr. Huckaba be excused?

The Court: Do you wish to call him as your witness? [37]

Mr. Crosby: Yes, I do, your Honor.

The Court: Then he will not be excused.

Mr. Crosby: Your Honor, at this time I would like to file a memorandum of authorities which has previously been served upon opposing Counsel.

The Court: I wish both sides to know the Court will welcome any trial memorandum that they may see fit to file. Court is now at recess subject to call.

(Short recess.)

The Court: Do you think it will take substantially a half hour, as I have been informed?

Mr. Shapro: Yes, your Honor. It is a laborious task, unfortunately.

The Court: In that case the court will be at recess as far as the trial proceedings are concerned until tomorrow morning at 10:00 o'clock, and Counsel may remain here and I wish you would remain here for the time that you need and attend to these matters.

Mr. Shapro: We will do so, your Honor. Thank you.

(Thereupon, at 3:25 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, June 14, 1956.) [38]

Thursday, June 14, 1956—10:25 o'Clock A.M.

(All parties present as before.)

The Court: You may now proceed if you are ready.

Mr. Shapro: Your Honor, pursuant to your

Honor's suggestion of yesterday, Mr. Crosby and I have exchanged documents for inspection, such documents as each of us feel may be offered in evidence during the course of this trial. I say may be, your Honor, because both in his case and in mine the offering of certain of these documents will depend upon how much of the other's evidence is received. In other words, say for argument, your Honor, on our case there were only two documents that we proposed to offer, whereas we have about sixteen that we may have to offer, depending upon how much evidence in the defense or on cross-examination of plaintiff's witnesses may be received by the Court.

What we have done, which we hope will meet with your Honor's approval, is, we have advised each other which of the other's documents we will not object to when they are offered, and we have also advised each other of the grounds upon which we will object to those of the others when and if they are offered. We have [39] read each other's documents—in other words, there won't be any delay in connection with that, we are familiar with each other's documents, and since some of the documents we wanted were in Counsel's possession and in turn the reverse, we have them all available now for each other. There are not many documents, your Honor, that we have suggested that the plaintiff might offer that Counsel for the defendant has indicated he has no objection to and there are not very many of his that we have indicated no objection to either. So I think that if your Honor would

prefer we can—we have them grouped now, we can offer them for marking for identification or we can do likewise as they arise, whichever your Honor prefers.

The Court: It doesn't matter with me. I think probably you might treat them more logically if they are handled, in view of the fact that we have delayed this long for the pretrial procedure, if they are handled in the order in which you think they will properly come up, if that is agreeable with you, Mr. Shapro.

Mr. Shapro: That is perfectly satisfactory, your Honor.

Mr. Crosby: That is satisfactory, your Honor.

The Court: Very well. [40]

Mr. Shapro: Thank you, your Honor. Then the plaintiff will call at this time Mr. E. J. Barshell.

The Court: Come forward and be sworn as a witness, Mr. Barshell.

EDWIN J. BARSHELL

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. Barshell, your full name, please?

A. Edwin J. Barshell.

Q. And you reside where, Mr. Barshell?

A. In Burlingame, California.

Q. And at the present time you are an officer of

(Testimony of Edwin J. Barshell.)

Western Machinery Company, the plaintiff in this case? A. I am.

Q. And what is your office?

A. I am the Secretary-Controller of Western Machinery Company.

Q. Are the records of the company with respect to among other things sales, purchases, accounts and collections kept under your supervision?

A. They are.

The Clerk: Plaintiff's Exhibit No. 3. [41]

(Six invoices of Western Machinery Company were marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Shapro): Mr. Barshell, you have been handed Plaintiff's Exhibit No. 3, which consists of what purport to be six invoices on the invoice head of Western Machinery Company. Do you recognize those documents? A. I do.

Q. Of your own knowledge, what are they?

A. They are copies of the invoices issued by Western Machinery Company to the Northwestern Improvement Company.

Mr. Shapro: Would the bailiff show the witness Plaintiff's Exhibits Nos. 1 and 2, please?

(The bailiff did as requested.)

Q. (By Mr. Shapro): Mr. Barshell, will you examine Plaintiff's Exhibits Nos. 1 and 2 and then tell the Court if you can, of your own knowledge, whether or not the six invoices comprising Plain-

(Testimony of Edwin J. Barshell.)

tiff's Exhibit 3 represent billings for the equipment described in Exhibits 1 and 2?

A. They represent the billings for the equipment represented in Exhibits 1 and 2.

The Clerk: Plaintiff's Exhibit No. 4.

(An invoice of Western [42] Machinery Company was marked Plaintiff's Exhibit No. 4 for identification.)

Mr. Shapro: At this time, your Honor, we offer in evidence on behalf of plaintiff the documents marked Plaintiff's Exhibit No. 3.

Mr. Crosby: I object to the admissibility at this time until I have an opportunity to cross-examine the witness in connection with it, as I feel that the exhibits cover additional items over and above those shown in Plaintiff's Exhibits 1 and 2.

The Court: Do you wish them disregarded as to those additional items, if any?

Mr. Shapro: If any—well, your Honor—

The Court: Give the witness an opportunity to say—

Mr. Shapro: This is another document now, your Honor.

The Court: I wish to deal with this other one first. We will go back to that, Plaintiff's Exhibit No. 3. Invite his attention to that subject.

Mr. Shapro: As far as the—

The Court: If it is based on fact, Mr. Shapro, this objection is well taken; only, however, if it is

(Testimony of Edwin J. Barshell.)

based upon actual fact that it refers to matters other than what has been mentioned. [43]

Mr. Shapro: Well, may I develop that then, your Honor? In other words, I will withdraw the offer at the moment of Exhibit No. 3.

The Court: You may proceed.

Q. (By Mr. Shapro): Mr. Barshell, referring your attention to Plaintiff's Exhibit No. 3, what items of equipment, if any, are included therein that are not specified in Exhibits 1 and 2?

A. Mr. Shapro, in checking this we find that there were included some additional items which were billed or invoiced by Exhibit No. 3 which were not originally specified in Exhibits Nos. 1 and 2.

Q. Do you know what those items are?

A. They consisted of two additional spirals, coal dewatering devices.

Q. And do you know the amount included in the billings of Plaintiff's Exhibit No. 3 for the additional items that you have just described?

A. I would assume, and I'm—

Mr. Crosby: I object to the answer.

The Court: Answer only if you know. If you know that answer, you may state it. If you don't, do not do so.

A. It is the difference between the invoiced amount—

Mr. Crosby: I object to this answer as the [44] witness said that he assumed.

(Testimony of Edwin J. Barshell.)

The Court: The objection is overruled. He may make the statement that he has now begun.

A. It is the difference between the total amount of the order reflected in Invoice No. 377—

The Court: I don't know what that is.

A. I beg your pardon. Exhibit No. 3.

Q. (By Mr. Shapro): There are six invoices that are a part of Exhibit No. 3, is that right?

A. That is right.

Q. Your last statement, Mr. Barshell, was directed to one of those six invoices?

A. They show the total—on the final—on Billing No. 6 it shows the total amount of the order.

Q. As what amount?

A. As \$68,074, which does not include freight or sales taxes.

Q. All right. Now take a look at Plaintiff's Exhibit No. 2. What is the amount of that without freight or sales taxes? A. \$63,680.

Q. If you know, what is represented by the difference between the \$68,074 figure and the \$63,680 figure?

A. The additional equipment mentioned by me before.

Mr. Shapro: We now renew the offer in [45] evidence of Plaintiff's Exhibit No. 3.

The Court: I don't understand for what purpose you offer the exhibit with respect to those objected to items.

Mr. Shapro: They are the total of those invoices, which is—

(Testimony of Edwin J. Barshell.)

The Court: Do you seek recovery in respect to those additional items?

Mr. Shapro: Yes, your Honor, certainly. They are in the complaint. They are part of the complaint.

The Court: Any further objection?

Mr. Crosby: Yes, I still object to the invoices in respect to the additions over and above the amounts shown by Plaintiff's Exhibits 1 and 2 since there has been no testimony here to the effect that any additional items were ordered by either Bellingham Coal Mine or N. W. I. nor delivered to them.

Mr. Shapro: Your Honor, such is not the fact. The Witness, Huckaba, yesterday testified on cross-examination as to these same spirals, the additional ordering and the additional delivery.

The Court: The objections are overruled. Plaintiff's Exhibit 3 is now admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.) [46]

Q. (By Mr. Shapro): Mr. Barshell, will you examine Plaintiff's Exhibit 4, please, and tell the Court whether or not of your own knowledge you know what that document is?

A. This is a statement rendered after the final shipment of all items covered by Exhibit No. 3 to Northwestern Improvement Company indicating the total amount due.

Q. And what is that total amount?

(Testimony of Edwin J. Barshell.)

A. \$71,038.71.

Mr. Shapro: Mr. Crosby, will you stipulate that the rubber stamp appearing on the face of Exhibit No. 4 saying, "Approved, Manager of Coal Operations," and the signature thereon of Earl R. McMillan, are the genuine rubber stamp and signature of the Northwestern Improvement Company?

Mr. Crosby: I will stipulate to that, but not to the admissibility of the exhibit.

Mr. Shapro: I didn't ask you to stipulate to the admissibility of it. Now, there is also on Exhibit 4, Mr. Crosby, a blue stamp indicating the receipt of that by the manager of the Northwestern Improvement Company. Will you stipulate that that is the authentic stamp of the Northwestern Improvement Company?

Mr. Crosby: Yes, I will. [47]

Mr. Shapro: At this time, your Honor, we offer in evidence Plaintiff's Exhibit No. 4. It represents as an admission against interest, signed by the defendant, received by the defendant and approved in writing by its manager of coal operations of the exact amount of the original demand in plaintiff's complaint.

Mr. Crosby: Your Honor, I would like to make the same objection to this exhibit that I made to Exhibit No. 3, in that this includes additional items besides those shown in Plaintiff's Exhibits 1 and 2, and as for any amount in addition to \$63,680 I feel that any order there was not covered by those original quotations and letter and were not within

(Testimony of Edwin J. Barshell.)

the scope of Mr. Huckaba's original testimony, and there was no proof of ordering or delivery by the Northwestern Improvement Company.

The Court: I have not retained in my mind what, if anything, was said by this witness regarding the company management or the business identification of the person signing this approval stamp, Carl or——

Mr. Shapro: Earl R. McMillan. We stipulated, your Honor, that he was the manager of coal operations of the defendant Northwestern Improvement Company to whom the statement was addressed. [48]

The Court: Is there anything in the evidence as to in what capacity he signed this approval?

Mr. Shapro: The document, your Honor, we submit, speaks for itself. He signed it as manager of coal operations.

The Court: There isn't anything on that stamp as to whose coal operations he was manager of.

Mr. Shapro: Well, it is stipulated that Mr. McMillan was on August the 15th, 1952, the manager of coal operations of Northwestern Improvement Company.

Mr. Crosby: But in his approval on there he——

The Court: Is it or is it not so stipulated?

Mr. Crosby: It is not stipulated that his signature on there was as manager of——

The Court: Then it hasn't been stipulated yet. You needn't say what is not. Did you hear what

(Testimony of Edwin J. Barshell.)

Counsel asked you? And I would like you to say yes or no.

Mr. Shapro: Shall I repeat it, your Honor?

The Court: Yes.

Mr. Shapro: I say, will you stipulate, Mr. Crosby, that on August 15, 1952, which is the date of the receipt by Northwestern Improvement Company in its office of the item marked Plaintiff's Exhibit No. 4, that Earl R. McMillan was the manager of coal operations [49] of Northwestern Improvement Company?

Mr. Crosby: I will stipulate to that, yes.

The Court: Now, did you wish to state a further objection or further clarification?

Mr. Crosby: I wish to further object in that it is not shown that this approval was as manager of coal operations of Northwestern Improvement Company, as the testimony has also shown that Northwestern Improvement Company was managing the Bellingham Coal Mine Company to which this equipment was delivered.

Mr. Shapro: May I respond, your Honor?

The Court: Yes.

Mr. Shapro: The invoice is addressed to Northwestern Improvement Company, the statement is addressed—it is marked “Approved, Manager of Coal Operations,” without reservation. Counsel has just stipulated that the man who approved it was the manager of the coal operations of Northwestern Improvement Company.

(Testimony of Edwin J. Barshell.)

The Court: The objections are overruled. Plaintiff's Exhibit 4 is admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Mr. Shapro: I have no further questions of this witness, your Honor. [50]

The Court: You may cross-examine.

Cross-Examination

By Mr. Crosby:

Q. Mr. Barshell, would you please refer to Plaintiff's Exhibit No. 1, which is the quotation, and also referring to Plaintiff's Exhibit No. 3, do you find that the Riplflow vibrating screens are the same, the invoice which is Exhibit No. 3 cover the same Riplflow vibrating screens as are shown on Exhibit No. 1?

A. Mr. Crosby, Exhibit No. 3 indicates only the billing for a unit described as a 3C Mobil Mill.

Q. You, yourself, do not know whether Invoice No. 3 covers equipment that has the same Riplflow vibrating screens as are shown in Plaintiff's Exhibit No. 1, do you? A. I do not.

Q. It could have been changed and you wouldn't be aware of it? A. Yes, sir.

Q. Isn't that correct? A. That is right.

Q. So that as far as you're concerned Exhibit No. 3 is merely a piece of paper which is under your custody, you had nothing to do with the prepa-

(Testimony of Edwin J. Barshell.)

ration of it nor do you know exactly what it [51] covers?

A. I know it covers a shipment to the Northwestern Improvement Company.

Q. Yes, but you don't know what the exact equipment was that was shipped, do you?

A. The exact equipment?

Q. Yes. You don't know what exact equipment was shipped to Bellingham Coal Mine? You don't know whether it's the same or different equipment than that shown on Exhibit No. 1?

A. Mr. Crosby, I might assume that this Exhibit No. 1 or No. 2 have an order number written on. This invoice indicates the same order number.

Mr. Crosby: I wish that the answer be stricken.

The Court: The answer is stricken. Answer responsively.

A. Yes, your Honor.

The Court: I believe he is calling for your personal knowledge.

A. My personal knowledge, no, Mr. Crosby, I do not know.

Mr. Crosby: I would like to have these marked.

The Clerk: Do you want them marked together, Mr. Crosby?

Mr. Crosby: It is satisfactory to have those [52] marked as one exhibit.

The Court: Is there any objection?

Mr. Shapro: No objection to that method of marking, your Honor.

The Clerk: Defendant's Exhibit No. A-4.

(Testimony of Edwin J. Barshell.)

(Seven cancelled checks were marked Defendant's Exhibit No. A-4 for identification.)

The Clerk: Defendant's Exhibit No. A-5.

(Copy of letter dated 15 August, 1952, from Bellingham Coal Mines Co. to Western Machinery Co. was marked Defendant's Exhibit No. A-5 for identification.)

The Court: May I suggest, Mr. Crosby, that you are doing the very same thing you did yesterday as it appears on the face of the thing. For instance, at this moment I do not recall anything that this witness said that makes these documents come within the scope of the direct examination. They look like things which you should prove by your own witnesses as a part of the defendant's case in chief. That is the way they look. However, if you can show that they connect some integral part with or have some connection with his testimony on direct, you may proceed. I just want to remind you it looks to me like you are starting right off on the same tack you did yesterday afternoon, [53] wasting a lot of your time and everybody's time here out of order. You may proceed, though.

Mr. Crosby: Well, your Honor, this man has introduced certain invoices. I think it is proper to show payment that they received on these invoices.

Mr. Shapro: Your Honor, only to the extent, I mean as long as Your Honor has brought up the subject, we do not believe that it is material for

(Testimony of Edwin J. Barshell.)

the defense to show payment unless and except to the extent, if they have any, that they purport to show payment in excess of the \$22,089.76, which we admit in our complaint. Other than that there is no materiality to it so far as cross-examination is concerned.

The Court: The objection is overruled. You may proceed.

Q. (By Mr. Crosby): Mr. Barshell, would you please refer to Defendant's Exhibits Nos. A-4 and A-5—

The Court: Now, ask him another question. He is looking at them.

Mr. Crosby: I might save some time if Counsel wishes to stipulate that these were received by the plaintiff in payment of the invoices which are shown by Plaintiff's Exhibits 3 and 4.

Mr. Shapro: I will stipulate that Defendant's Exhibit A-5, the letter, the original of it was [54] received by us. I stipulate that we received, "we," meaning the plaintiff, received the checks comprising Defendant's Exhibit A-4. However, to the extent that the aggregate, which I am taking Mr. Crosby's statement for, of those checks is \$752.03 in excess of the amount specified in our complaint as a credit against the account, we do not so stipulate that they applied on this account.

The Court: But they were received on account now here in suit?

Mr. Shapro: No, your Honor. They were all re-

(Testimony of Edwin J. Barshell.)

ceived on this account with the exception of an amount of \$752.03.

The Court: They were as to some part of the total amount received in part payment on this account?

Mr. Shapro: No, your Honor, I can't agree to that. I'm sorry, sir, because——

The Court: Then I misunderstand you.

Mr. Shapro: There were other accounts involved.

The Court: Was any part of them received by the plaintiff on this account for the alleged sale to the defendant in this case?

Mr. Shapro: Yes, your Honor, an aggregate of \$22,089.76. [55]

The Court: Which exhibit is that?

Mr. Crosby: That is A-4.

The Court: Do you offer that?

Mr. Crosby: I now offer it.

The Court: The objection is overruled. Defendant's Exhibit A-4 is admitted.

(Defendant's Exhibit No. A-4 for identification was admitted in evidence.)

Mr. Crosby: I offer Defendant's Exhibit A-5, which is a letter enclosing a check for \$15,000, which I'm sure Counsel will stipulate was paid on this account.

Mr. Shapro: No objection.

The Court: Admitted.

(Testimony of Edwin J. Barshell.)

(Defendant's Exhibit No. A-5 for identification was admitted in evidence.)

Mr. Crosby: I have no further questions.

The Court: You may inquire.

Mr. Shapro: Yes, I would like to.

The Court: You may do so.

Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, will you examine Defendant's Exhibit A-4 and tell the Court whether or not from looking at those checks you can tell if they all were received and [56] applied by your company in partial payment of the item covered by the \$71,000 charge?

A. I can state that—now, will you repeat that question, please?

The Court: Mr. Reporter, will you kindly do so?

(The reporter read the last question.)

A. They were not all received by us and applied in partial payment.

Q. (By Mr. Shapro): Can you tell the Court which of those checks or what portion of any of those checks was not received and applied by you in partial payment of that account?

A. Check No. 743 for \$28.14, Check No. 929 for \$204.84—

Mr. Crosby: I'm sorry, I didn't get that last amount.

(Testimony of Edwin J. Barshell.)

Mr. Shapro: \$204.84.

A. In fact, Mr. Shapro, Check No. 929 never came into our hands at all. The proceeds did, but this didn't.

Q. (By Mr. Shapro): Well, the proceeds came into your hands? A. That's right.

Q. That's all that is necessary.

The Court: Were they applied to this account?

A. No, sir, the proceeds of this were not [57] applied to this particular account.

Q. (By Mr. Shapro): What is the amount of that? A. \$204.84.

Q. That's a repetition of the same amount?

A. I can't hear you, sir.

The Court: No, he is restating what he has already stated, in my opinion.

Mr. Shapro: Oh, I see.

Q. (By Mr. Shapro): Mr. Barshell, so there will be no confusion in the record, you have referred to an item of \$28.14——

A. That's Check No. 743, dated June the 30th.

Q. And you have referred to an item of \$204.84.

A. That's Check No. 929, dated October the 9th, 1953.

Q. Are there any other of those checks that you can testify were not received and applied by your company on account of the obligation sued here-upon?

A. Mr. Shapro, I do not know about all of them. I mean those two I know definitely did not apply.

Q. Do you know, Mr. Barshell, whether or not

(Testimony of Edwin J. Barshell.)

any of the items covered by those checks included interest upon any portion of this obligation as distinguished from the principal thereof?

A. I know of my own knowledge that it did.

Q. That it did? [58] A. It did.

Q. Can you tell how much of the aggregate of those checks other than the \$15,000 check included such interest?

A. I cannot tell by inspection of the checks.

Q. To the extent, Mr. Barshell, that the aggregate of the checks comprising Defendant's Exhibit A-4 exceeds the sum of \$22,089.76, which difference is \$752.03, can you tell the Court of your own knowledge what that represents?

A. That represented interest.

The Court: Which one is that, which one?

A. The difference, your Honor, between the value of these checks in the aggregate and the amount of \$22,089.04, I believe.

The Court: Where is that shown, on which one of the exhibits?

Mr. Shapro: It's only the aggregate, the total, your Honor.

The Witness: It's only the aggregate total, your Honor.

The Court: Is that made up by you orally at this time or is it something shown on one of the exhibits?

A. It's not on these exhibits, your Honor.

Mr. Shapro: I have no further questions. [59]

(Testimony of Edwin J. Barshell.)

The Court: Any further cross-examination?

Mr. Crosby: Yes, your Honor.

Recross-Examination

By Mr. Crosby:

Q. Mr. Barshell, you're just guessing, aren't you, when you say that the difference represents interest? You personally don't know?

The Court: Just ask him one question at a time.

Q. (By Mr. Crosby): You're just guessing when you say the difference represents interest?

A. Mr. Crosby——

The Witness: May I ask a question, your Honor?

The Court: No, you answer.

A. I'm sorry. Am I guessing?

Q. (By Mr. Crosby): Yes.

A. No, I am not guessing.

Q. Well, this was an open account, wasn't it? Why should you charge interest on an open account?

Mr. Shapro: I object to that, if your Honor please, on the ground it is argumentative and calls for the opinion and conclusion of the witness.

The Court: Objection sustained. He hasn't [60] said it was an open account. That is the fault with Counsel's form of interrogation. You have asked two questions before you let the witness answer.

Mr. Crosby: I'm sorry, your Honor. I will withdraw the questions.

(Testimony of Edwin J. Barshell.)

Q. (By Mr. Crosby): The billings shown by Plaintiff's Exhibits 3 and 4 are for an open account, aren't they? A. They are.

Q. Did the Western Machinery Company have any agreement to charge interest on that open account? A. They did not.

Q. So then if there was any interest from those payments charged, if there was any portions of those checks shown by Defendant's A-4 applied toward interest, then it was applied improperly?

Mr. Shapro: I object to that, if your Honor please, on the ground it calls for the opinion and conclusion of the witness.

The Court: The objection is overruled. Be sure to make your statements in the form of clear questions and not just make statements where you have to see a question mark to know it is a question, because the reporter might not get down the question mark.

Mr. Crosby: I'm sorry, your Honor. I will endeavor to do that. [61]

Q. (By Mr. Crosby): Mr. Barshell, would you prefer that I restate the question?

A. Oh. Will you restate the question, please?

Q. Isn't it true that Western Machinery Company should not have applied any of the payments toward invoices shown by Plaintiff's Exhibits 3 and 4 toward interest?

Mr. Shapro: I object, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

(Testimony of Edwin J. Barshell.)

The Court: The objection is overruled. This witness is in an accounting capacity largely. You may answer.

A. The interest reflected by these checks was applied to a note of Bellingham Coal Company.

Q. (By Mr. Crosby): I would like to again ask you, Mr. Barshell, isn't it true that as far as any account of Northwestern Improvement Company the Western Machinery Company should not have charged any interest?

A. That is right.

The Clerk: Defendant's Exhibit No. A-6.

(A promissory note dated August 20, 1952, from Bellingham Coal Mines Co., to Western Machinery Co., was marked Defendant's Exhibit No. A-6 for identification.)

Mr. Crosby: Your Honor, in view of what [62] has been developed on——

The Court: At this time we will take about a ten minute recess. Those connected with this case will be excused. I wish to take up something else that does not concern this case.

(Short recess.)

The Court: All are present. You may proceed.

EDWIN J. BARSHELL

resumed the stand:

Mr. Shapro: Your Honor, may I ask your Honor's indulgence for a moment? I think it will

(Testimony of Edwin J. Barshell.)

help clarify the situation as a result of what I have done during the recess. Will your Honor permit me to take up with Mr. Barshell on redirect before Counsel completes this recross the subject matter of those checks that are part of Exhibit A-4?

The Court: Yes.

Mr. Shapro: I think it will help to clarify what otherwise might be a muddy situation.

The Court: You may proceed.

Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, will you look at the checks comprising Defendant's Exhibit A-4 and tell me whether or not you have with you records here which will indicate the [63] application of three of those checks to other than the Mobil Mill?

Mr. Crosby: I object to that as a leading question.

The Court: Sustained.

Q. (By Mr. Shapro): Mr. Barshell, do you have any records here that have not been made available to you so far in court that can identify any of those checks?

Mr. Crosby: Well, I object to that question as being too broad.

The Court: The objection is overruled.

A. We have.

Q. (By Mr. Shapro): And what is it?

A. It constitutes the open account of the Bellingham Coal Company.

(Testimony of Edwin J. Barshell.)

The Court: What does that constitute?

A. That's the ledger account of the open account of the Bellingham Coal Company.

The Court: It has not been marked yet.

Mr. Shapro: I haven't handed it up yet.

The Court: You should have anything that a witness speaks of in his testimony already identified in some way by the clerk with a mark so that there is always connection without any argument about what the witness was speaking of. [64]

The Clerk: Defendant's Exhibits A-7, A-8 and A-9.

(Western Machinery Co. accounts receivable ledger re Bellingham Coal Mines, was marked Defendant's Exhibit No. A-7 for identification.)

(Western Machinery Co. accounts receivable ledger re Northwest Improvement Co., was marked Defendant's Exhibit No. A-8 for identification.)

(A letter dated August 23, 1952, from Herbert S. Little to E. J. Barshell, was marked Defendant's Exhibit No. A-9 for identification.)

The Clerk: This is Plaintiff's Exhibit No. 5.

(Western Machinery Co. accounts receivable ledger re Bellingham Coal Mines, was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: I had not known that anybody had

(Testimony of Edwin J. Barshell.)

asked for any marking of any Defendant's Exhibits. When was that request made?

Mr. Crosby: Your Honor, before Counsel asked to go back to his redirect I had already handed to the clerk for marking three additional exhibits. I wasn't advised that Counsel wished to re-examine his witness.

Mr. Shapro: That is correct, your Honor. It's my fault. By asking that indulgence I have probably broken up the line of questioning. [65]

The Court: Do you wish the clerk to mark for identification Defendant's Exhibits A-7, A-8 and A-9, Mr. Crosby?

Mr. Crosby: Yes, I do, your Honor.

The Court: Do you, Mr. Shapro, wish the clerk to mark for identification Plaintiff's Exhibit 5?

Mr. Shapro: I do, your Honor. Might I ask that the record show that in the last answer of the witness referring to an open account of Bellingham Coal Mine Company, he was referring to what is now marked Plaintiff's Exhibit No. 5.

The Court: I ask the witness if that is true?

A. Yes, your Honor.

Q. (By Mr. Shapro): Mr. Barshell, with Plaintiff's Exhibit 5 in your hand and by comparing that with the checks comprising Defendant's Exhibit A-4, can you tell the Court now which if any of the checks comprising Defendant's Exhibit A-4 were received by Western Machinery Company for accounts other than the Mobil Mill account sued upon herein?

(Testimony of Edwin J. Barshell.)

A. Check No. 743 dated June the 30th in the sum of \$28.14 was applied to the Bellingham Coal Mines' open account. Check No. 929 dated October the 9th, 1953, in the sum of \$204.84 was applied to Bellingham Mines' open account. Check No. 1017 dated November 10, 1953, in [66] the sum of \$1,612.67 was applied to Bellingham Mines' open account.

Mr. Shapro: At this time, your Honor, we offer——

The Court: Of what exhibit, if any, are those checks a part?

Mr. Shapro: They are a part of——

The Court: Just a minute.

Mr. Shapro: Oh, pardon me.

The Court: Mr. Barshell?

A. They are a part of Exhibit No. A-4, your Honor.

The Court: That is Defendant's Exhibit A-4?

A. That is right, your Honor.

The Court: Does Defendant's Exhibit A-4 contain any check or voucher indicating payment by Bellingham Coal Mines of any account other than those you have mentioned?

A. Yes, your Honor.

The Court: Did you say or did you not intend to say that that Defendant's Exhibit A-4 contains among other things checks or vouchers of the Bellingham Coal Mines paying on account of an open account which your company had direct with Bellingham Coal Mines?

(Testimony of Edwin J. Barshell.)

A. Yes. [67]

The Court: Different from the account which is connected with Plaintiff's Exhibits 1 and 2?

A. Yes, your Honor.

The Court: State how many checks there are of that Defendant's Exhibit A-4 that relate to the so-called open account of Bellingham Coal Mines.

A. Three of them, your Honor.

The Court: What are their numbers?

A. This is the open account, your Honor, of the Bellingham Coal Mine.

The Court: Wait a minute. Three checks numbered what?

A. 743, your Honor, for twenty-eight fourteen.

The Court: Twenty-eight what, dollars?

A. Dollars and fourteen cents. 929 for \$204.84, and 1017 for \$1,612.67.

The Court: Did you or did you not say that those three checks were sent for and received by the plaintiff in payment on the open account with Bellingham Coal Mines?

A. That is right, your Honor.

The Court: You may inquire.

Mr. Shapro: At this time, if your Honor please, we offer in evidence Plaintiff's Exhibit 5. [68]

Mr. Crosby: I object to the admissibility of that exhibit as it is an open account which is not involved in this particular suit, it is entirely self-serving, and as to what Western Machinery did with these checks and what records they made showing applying payment in any other manner than to-

(Testimony of Edwin J. Barshell.)

ward the account in issue, I contend that it is not material in this case.

Mr. Shapro: Your Honor, this is redirect examination. On cross-examination the defense offered through this witness and your Honor received a group of checks over my objection on the basis that they exceeded in amount the amounts applicable to this account. On redirect I have established through this witness and the Plaintiff's Exhibit No. 5 that three of the checks offered by the defendant are not applicable to the account for which they seek credit. In effect it is rebuttal, and it is certainly admissible for that purpose, your Honor.

The Court: I want to ask the witness to point out on Plaintiff's Exhibit 4 if there is any entry thereon of either one of these checks that you have mentioned as having been received by the plaintiff and applied on the Bellingham Coal Mines open account.

A. On that one, your Honor? [69]

The Court: Yes.

A. Yes.

The Court: Which one?

A. \$28.14, your Honor, \$204.84 and \$1,612, your Honor.

The Court: The objection is overruled and Plaintiff's Exhibit 5 is now admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

(Testimony of Edwin J. Barshell.)

Mr. Shapro: I have no further questions, your Honor.

The Court: Have you any further recross-examination, Mr. Crosby?

Mr. Crosby: Yes, your Honor.

The Court: You may proceed.

Mr. Crosby: Is the letter from Mr. Little to Mr. Shapro marked for identification?

The Clerk: It is Defendant's Exhibit No. A-10.

(A letter dated Nov. 12, 1953, from Little, LeSourd, Palmer, Scott & Slemmons by Warren R. Slemmons, to Arthur P. Shapro, was marked Defendant's Exhibit No. A-10 for identification.)

Mr. Crosby: It is stipulated—Counsel, is it correct that it is stipulated that Mr. Little's [70] letter to you is admissible in evidence as showing the transmittal of the Check No. 1017 in the amount of \$1,612.67?

Mr. Shapro: Yes.

Mr. Crosby: Is your Honor ready to proceed?

The Court: Yes, you may proceed.

Recross-Examination

By Mr. Crosby:

Q. Mr. Barshell, with reference to Check No. 1017 which you stated was applied toward the open account, did you receive that check through Mr. Shapro? A. We did.

Q. With reference to Check No. 929 in the

(Testimony of Edwin J. Barshell.)

amount of \$204.84, did you receive any instructions from the Bellingham Coal Mine Company relative to the account toward which that check should be applied? A. 929?

Q. Yes, 929, in the amount of \$204.84.

A. This check was never received by us.

Q. Who received that check?

A. The truck—the storage warehouse who held material to be delivered to Bellingham Mines when they withdrew it from storage for their use.

Q. And what equipment was that? [71]

A. That was repair parts shipped by us.

Q. With reference to Check No. 743 in the amount of \$28.14, did you receive any instructions from Bellingham Coal Mine Company as to what account that should be applied to?

A. From an inspection of the check, Mr. Crosby, I don't know.

Mr. Crosby: I would like to have the witness handed Defendant's Exhibits A-6, 7, 8 and 9.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. Barshell, will you please refer to Defendant's Exhibit No. A-8. Please tell the Court what that is.

A. A ledger sheet—

Mr. Shapro: That is objected to, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial and not proper recross-examination. An examination of your Honor of the ledger sheet which is A-8 I think will convince your Honor that

(Testimony of Edwin J. Barshell.)

it is not the proper subject of cross-examination. It's part of the affirmative defense.

Mr. Crosby: Your Honor, this is the ledger sheet showing the Northwestern Improvement Company's alleged open account and has information which is contrary to what Mr. Barshell has testified to and [72] shows——

The Court: The objection is sustained. You may offer it as a part of your case in chief and you may retain this witness in attendance for the purpose of calling him in that connection if you wish.

Mr. Crosby: I have no further questions of this witness.

Mr. Shapro: No more questions, your Honor.

The Court: Step down.

(Witness excused.)

The Court: You may call the next plaintiff's witness.

Mr. Shapro: The plaintiff at this time rests, your Honor.

The Court: The defendant may now proceed.

Mr. Crosby: Mr. Huckaba.

The Court: Do you waive the opening statement, Mr. Crosby?

Mr. Crosby: Yes, I waive my opening statement, your Honor.

The Court: Very well, then you may call Mr. Huckaba as a defendant's witness. He has already been sworn. Will you come forward and take the stand, Mr. Huckaba. [73]

J. STANLEY HUCKABA

recalled as a witness in behalf of defendant, being previously duly sworn, was examined and testified further as follows:

Mr. Crosby: I would like to have handed to the witness Defendant's Exhibits A-1, 2 and 3, and also Plaintiff's Exhibits 1 and 2.

(The bailiff did as requested.)

Mr. Crosby: I would like to have this quotation of January 16th marked for identification.

The Clerk: They will be marked Defendant's Exhibits A-11 and A-12.

Mr. Crosby: I thought, your Honor, to expedite matters I would have marked all at once the exhibits which this witness will be referring to.

The Court: Let Counsel see if the ones handed him are the ones he last referred to. Do you wish those two marked as one exhibit?

Mr. Crosby: Yes. I believe they go together.

The Court: Is there any objection to that, Mr. Shapro?

Mr. Shapro: No, no objection, your Honor.

The Court: Is it your wish to include them in the same exhibit?

Mr. Crosby: The three blue sheets should be marked as one exhibit, your Honor. [74]

The Clerk: It will be marked Defendant's Exhibit A-11, your Honor.

(A quotation dated January 16, 1952, was marked Defendant's Exhibit No. A-11 for identification.)

(Testimony of J. Stanley Huckaba.)

The Clerk: Defendant's Exhibits A-12 and A-13.

(A letter dated January 29, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-12 for identification.)

(A letter dated January 22, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-13 for identification.)

Mr. Crosby: Your Honor, as to Exhibit No.
10—

The Court: Do you mean A-10?

Mr. Crosby: A-10, I would like to have that offered in evidence. That is Mr. Little's letter to Mr. Shapro.

The Court: Any objection?

Mr. Shapro: No objection, your Honor.

The Court: Admitted.

(Defendant's Exhibit No. A-10 for identification was admitted in evidence.)

Mr. Crosby: I have had marked for identification [75] as A-11 a three page quotation dated January 16, 1952.

The Court: Do you want to offer it or do you want to call it to the attention of the witness?

Mr. Crosby: I wanted to call these to the attention of the witness.

The Court: You may do so. Proceed.

(Testimony of J. Stanley Huckaba.)

Mr. Crosby: And Defendant's Exhibit A-12, a letter from Mr. McMillan to Western Machinery Company to the attention of Mr. Huckaba dated January 29, 1952, and what has been marked for identification Defendant's Exhibit A-13, a letter from Mr. McMillan to Western Machinery attention Mr. Huckaba dated January 22, 1952.

Direct Examination

By Mr. Crosby:

Q. Mr. Huckaba, in your negotiations with Mr. McMillan did you at any time tender to Mr. McMillan quotations for machinery to be used for the Bellingham Coal Mine which were prepared by you prior to the tendering of Plaintiff's Exhibit No. 1, which is the quotation that was finally acted upon?

Mr. Shapro: I object to the question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in this case and is hearsay [76] by reason of being merged in Plaintiff's Exhibit 1 which is the subject matter of and to which the witness has already testified was preceded by these previous quotations and negotiations.

Mr. Crosby: Your Honor, it is part of defendant's affirmative defenses. They have alleged first that the Northwestern Improvement Company received no consideration for the subject matter of this action, and it is another affirmative defense that the Bellingham Coal Mine Company received a consideration for the subject matter of this action,

(Testimony of J. Stanley Huckaba.)

which was machinery, and that later on the plaintiff took a promissory note from Bellingham Coal Mine and that by their action they knew that Bellingham Coal Mine was the principal and that Northwestern Improvement Company was the surety, and the cases that I have cited to your Honor in my memorandum——

The Court: That memorandum apparently is not in this file. Mr. Clerk, will you see if you can find it?

(The clerk handed papers to the Court.)

The Court: Which authorities?

Mr. Crosby: The Ninth Circuit case of *Howell vs. War Finance Corporation* and the case which that one cites, *Hoffman vs. Habighorst*, clearly state [77] that we can show by parol evidence that the plaintiff knew that there was a third party who was actually the principal and that the party with which they were dealing was in the position of a surety, and what we are wanting to do at this time by our affirmative defense is to show by parol evidence that——

The Court: Where is your affirmative defense, Mr. Crosby?

Mr. Crosby: With reference to the amended answer, your Honor, first affirmative defense on Page 1 of the amended answer, your Honor. Counsel and I have stipulated that in the fourth line the word "plaintiff" can be changed to "defendant."

(Testimony of J. Stanley Huckaba.)

The Court: Was it the first or second affirmative defense?

Mr. Crosby: Referring to the first affirmative defense and pointing out to your Honor that Counsel and I have stipulated that the word "plaintiff" in the fourth line of that first affirmative defense can be changed from "plaintiff" to "defendant."

The Court: Any objection?

Mr. Shapro: No objection, your Honor.

The Court: I have made the change.

Mr. Crosby: Thank you very much, your Honor.

The Court: I will hear you, Mr. Shapro. [78]

Mr. Shapro: Your Honor, there is a vast difference between parol evidence as such and the parol evidence rule. The case to which Counsel refers, particularly the Hoffman vs. Habighorst case, is indicative of the fact that agency or suretyship may be shown by parol evidence, and it may be shown by parol evidence and perhaps there is a way in the course of this defense where it might be shown, but we have here—the objections that are pending before your Honor are to a question concerning documents, quotations and correspondence dated and transmitted prior to the effective date of the contract which is the subject matter of this action, and regardless of agency, regardless of suretyship or otherwise it is our contention, if your Honor please, that any prior negotiations or any documents referring to prior negotiations are necessarily by virtue of the parol evidence rule inviolate when merged in the ultimate document. Counsel is not

(Testimony of J. Stanley Huckaba.)

seeking by this question to elicit from any extraneous source on a parol evidence basis the question of lack of consideration or the question of suretyship both by his pleadings made a part of his affirmative defense. These documents about which the pending question concerns itself are admittedly from the previous testimony of the witness and from the face of the documents [79] themselves matters which preceded the contract, were part of his negotiations with the defendant and with Mr. McMillan, its representative, and therefore, if your Honor please, cannot be used to impeach the subsequent document into which they are merged.

The Court: My understanding of the point here is that this exhibit is offered for the sole purpose of showing that the defendant was in fact acting for another and that the plaintiff knew it.

Mr. Shapro: I understand that is the purpose of it.

The Court: It is not for the purpose of changing any written word or meaning of any written contract. Is that——

Mr. Shapro: No, I don't concede that to be correct, your Honor, with due respect.

The Court: Is that——

Mr. Crosby: That is right, your Honor. What I purport to show by this witness is that the plaintiff knew that Bellingham Coal Mine was getting the benefit of this machinery and the cases that I have cited——

The Court: I am sorry, getting the benefit does

(Testimony of J. Stanley Huckaba.)

not necessarily release one from being the principal on the contract. [80]

Mr. Crosby: I realize that, your Honor, but we are entitled to show under these cases who actually received the benefit from this contract and that the plaintiff knew who was receiving the benefit.

The Court: Do you mean as a part of your allegation that the defendant was acting not as the principal, but as a surety and as an agent for the principal?

Mr. Crosby: That's right. Might I refer to the facts—pardon me, I didn't mean to interrupt.

Mr. Shapro: No, go ahead. I think the Court was addressing you, sir.

The Court: I wish to hear what it is that is the limit, if any, or limits, if any, on the offer made by you, and that is all I am interested in at this time.

Mr. Crosby: We are going to offer these exhibits and the testimony of this witness, not to alter the terms of the contract or order shown by Exhibits 1 and 2 of plaintiff, but to show that the plaintiff knew that the Northwestern Improvement Company was acting as an agent for the Bellingham Coal Mine Company, that the Bellingham Coal Mine Company was getting the benefit of the machinery, and that in fact the Bellingham Coal Mine Company was the principal, [81] and if the Northwestern Improvement Company is responsible, that they are responsible only as surety.

Mr. Shapro: And even for the limited purposes for which Counsel has stated he is offering this

(Testimony of J. Stanley Huckaba.)

evidence on this question to which our objection is pending, your Honor, we submit that it would be a violation of the parol evidence rule, that it is incompetent, irrelevant and immaterial so to admit it because one of the terms of the contract is the name of the purchaser, and if Counsel seeks to show by this evidence that that purchaser instead of acting for himself or itself was in fact acting for another or as a surety for another, he is in effect changing one of the principal terms of the contract, namely the identity of a party to it.

The Court: In the absence of some authority controlling this Court's action the Court is of the opinion and rules that this evidence is admissible for the limited purpose for which I understand defendant's Counsel offers it, not for the purpose of varying the terms of the contract but for the purpose only, and for no other, of showing or tending to show who was the real party in interest, in other words who was the principal, in this transaction, and for that limited purpose only it is received in evidence. The exhibit [82] number was what?

Mr. Crosby: Defendant's Exhibits Nos. A-11, A-12 and A-13.

The Court: The one I was ruling upon was A-11. That exhibit, the objections being overruled, is now admitted, Defendant's Exhibit A-11.

(Defendant's Exhibit No. A-11 for identification was admitted in evidence.)

The Court: Is there any other evidence about

(Testimony of J. Stanley Huckaba.)

any other one which you wish to offer by way of authenticating the documents for admission, A-12 or A-13?

Mr. Crosby: Yes, A-12 and A-13.

The Court: What is the evidence before the Court relating to authentication? And if there isn't any, proceed to inquire.

Mr. Shapro: The authenticity of the two exhibits A-12 and A-13 is conceded, your Honor.

The Court: You haven't—

Mr. Crosby: I haven't inquired as yet, I realize.

The Court: I wish to know what the facts are about them with respect to the issue here, if you are going to offer them in evidence, with respect to this limited purpose. I want to know what the evidence [83] is.

Mr. Crosby: Yes, your Honor.

Q. (By Mr. Crosby): Mr. Huckaba, referring to Exhibit A-11, which is a quotation of January 16th. you prepared that quotation and gave it to Mr. McMillan, didn't you?

A. That's correct, yes.

The Court: Ask him. You are not entitled to lead him. I wish you could expedite it.

Q. (By Mr. Crosby): Referring to Exhibit No. A-13, did you receive that letter? Did you personally receive that letter?

A. Yes, I did.

Q. Exhibit No. A-13? A. Yes.

Q. When did you receive it, Mr. Huckaba?

A. Well, it was mailed to me on January 22nd

(Testimony of J. Stanley Huckaba.)

and I probably received it on about January 23rd, or 24th, 1952.

Q. And to what does the letter pertain?

Mr. Shapro: If your Honor please, the letter is the best evidence. It speaks for itself. We object on that ground.

The Court: No, the subject matter of the letter may be inquired into of this witness. The objection is overruled. To what it pertains may be [84] answered.

A. It pertains to the quotation made by myself to Mr. McMillan on January 16, 1952.

The Court: In what respect does it pertain to it, particularly as to with whom you were dealing in that transaction, if anything?

A. The quotation of January 16, 1952, was made to the Bellingham Coal Mines Company pertaining to coal washing equipment, and Mr. McMillan's letter of January 22, 1952, pertains to that same equipment and the prices and specifications given in the quotation.

The Court: You may inquire.

Mr. Crosby: I would like to offer in evidence——

The Court: The Court would like to know from this witness whether or not this letter and the other papers mentioned by him, to what transaction or transactions they apply, if he knows.

Q. (By Mr. Crosby): Mr. Huckaba, for what purpose did you make and prepare Exhibit No. A-11, which is the quotation of January 16, 1952?

A. It was in the process of negotiations between

(Testimony of J. Stanley Huckaba.)

myself and Mr. McMillan for a coal washing plant, and during that time we had various discussions and this is one of the quotations I made to him.

Q. At the time of preparing A-11, your quotation of January [85] 16th, who did you understand was going to purchase the coal washing plant?

A. The quotation was made to the Bellingham Coal Mines Company. The matter of purchase had not been discussed at that time, or terms of purchase.

The Court: May I ask you, with reference to that machinery which is mentioned in Plaintiff's Exhibits 1 and 2 and with reference to that machinery or merchandise which was mentioned in Defendant's Exhibits A-11, A-12 and A-13, what property, machinery or merchandise was referred to in these Defendant's Exhibits A-11, A-12 and A-13?

A. Well, Defendant's Exhibits A-11, A-12 and A-13 refer to an entirely different quotation for different machinery that was made on a previous date.

The Court: Is your last statement true of Defendant's Exhibit A-11?

A. Yes, sir.

The Court: The Court would like to reconsider its ruling.

Mr. Crosby: I would like to inquire further before the Court reconsiders, your Honor, because it does cover part of the same equipment.

The Court: Very well. You may inquire.

Q. (By Mr. Crosby): Mr. Huckaba, with ref-

(Testimony of J. Stanley Huckaba.)
erence to [86] Defendant's Exhibit A-11, referring to Item No. 1 which reads, "1 only C3 Wemco Mobil Mill," and with reference to Plaintiff's No. 1, of which Item No. 1 reads, "1 only C-3 Modified Wemco Mobil Mill," would you please advise the Court what similarities there are between those two pieces of equipment?

Mr. Shapro: I object to the form of the question, if your Honor please, upon the ground it is leading and suggestive. It assumes that there is a similarity.

The Court: That objection is sustained. On a proper question form the subject matter of the inquiry may be addressed to the witness after lunch. Is there any reason why Counsel could not return at 1:30?

Mr. Shapro: None at all, your Honor.

Mr. Crosby: No, your Honor.

The Court: Court is recessed until 1:30.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 1:30 o'clock p.m.) [87]

Thursday, June 14, 1956—1:35 o'Clock P.M.

(All parties present as before.)

The Court: Are all present in the case on trial?

Mr. Shapro: Yes, your Honor.

Mr. Crosby: Yes, your Honor.

The Court: You may proceed. The witness will resume the stand.

J. STANLEY HUCKABA

resumed the stand:

Direct Examination

(Continued)

By Mr. Crosby:

Q. Mr. Huckaba, with reference to Defendant's Exhibit A-11, which is your quotation of January 16, 1952, would you please explain the purpose of Item No. 1, which is, "1 3-C Wemco Mobil Mill"?

The Court: As I recall, that exhibit is the one as to which the Court struck the ruling, is it not?

Mr. Crosby: Yes.

Mr. Shapro: You were about to strike it, your Honor. You didn't strike it.

The Court: You wished to ask one or two other questions before the Court ruled. [88]

Mr. Crosby: Yes, your Honor.

The Court: You may proceed.

A. The item to which you refer is Item No. 1, the one only 3-C Mobil Mill, which in a sense is the coal washing—a coal washing plant.

Q. (By Mr. Crosby): Now, with reference to Plaintiff's Exhibit No. 1 which is being handed to you, which is your quotation of February 20, 1952, please explain the purpose of Item No. 1 on that exhibit.

A. The purpose of Item No. 1, "1 only 3-C Modified Wemco Mobil Mill," is also another size of a coal treating plant.

Q. So that the two plants were designed to do the same work?

(Testimony of J. Stanley Huckaba.)

A. They are both coal washing plants.

Q. Yes. Now, on Page 2 of Defendant's Exhibit No. A-11 would you direct your attention, please, to Items No. 2 and No. 3, and with reference to Plaintiff's Exhibit No. 1 on Page 2 I direct your attention to Items No. 3 and No. 4. Would you please advise the nature of those items listed and state their difference or similarity?

A. They are the—the quotations are identical.

Mr. Crosby: Your Honor, those were all the questions I had in connection with A-11 to show the similiarity of the equipment listed on the two exhibits. [89]

The Court: I would like for Counsel on one side or the other to give this witness an opportunity to testify concerning all the circumstances surrounding these two exhibits with reference to the point of time of each and just what happened in respect to each, and including what relationships if any there may have been in the dealings with respect to the one and with respect to the other. It would be proper for plaintiff's Counsel to ask those questions at this time, and if defendant's Counsel wishes to ask any further questions about that subject later the Court will hear those questions if they are proper.

Cross-Examination

By Mr. Shapro:

Q. Mr. Huckaba, referring your attention to Defendant's Exhibit A-11, which is dated January 16,

(Testimony of J. Stanley Huckaba.)

1952, will you tell the Court whether or not that was a part of the negotiations which you previously testified to went on over a period of months between you and Mr. McMillan in connection with a coal washing plant for the Bellingham Coal Mine at Bellingham, Washington?

A. This quotation A-11, Defendant's Exhibit A-11, to the best of my knowledge was the first quotation given to Mr. McMillan after we got together with specific [90] reference to the Bellingham Coal Mines installation.

Q. Now, with respect to Plaintiff's Exhibit No. 1 which is dated February 20th, is that the last quotation you made?

A. That is the last quotation made.

The Court: What is the date of each?

A. The date of the first is January 16, 1952.

The Court: That is Plaintiff's Exhibit 1?

A. No.

The Court: Give the number of the exhibit.

A. Defendant's Exhibit A-11.

The Court: That is what you meant by "the first one"?

A. Yes, your Honor. That's my quotation of January 16, 1952.

The Court: Is that what you meant by your expression "was the first" a moment ago?

A. Yes, your Honor.

Q. (By Mr. Shapro): The date of Plaintiff's Exhibit No. 1 is what, Mr. Huckaba?

(Testimony of J. Stanley Huckaba.)

A. The date of Plaintiff's Exhibit No. 1 is February the 20th, 1952.

Q. And is that the one to which you referred in response to a question of mine as the last of the quotations [91] that you made to Mr. McMillan on this subject? A. Yes.

Q. Were there any quotations made by you on the washing plant between those two dates?

A. I believe there were verbal quotations only.

Q. Referring your attention to Item No. 1 on each of those two exhibits, A-11 for the defendant and Plaintiff's Exhibit No. 1, you have testified that they were both coal washing plants. Is there a difference in the size and price between the two as quoted in the two different quotations?

A. In—

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Shapro): Will you give the price quoted in Defendant's Exhibit A-11?

A. The price quoted in A-11 is \$45,090 for the coal washing plant.

Q. And for the coal washing plant what is the price quoted in Plaintiff's Exhibit No. 1?

A. In Plaintiff's Exhibit No. 1 the price quoted was \$56,860.

Mr. Shapro: I have no further questions on that subject, your Honor.

The Court: Do you feel that there ought to [92] be some further questions, Mr. Crosby? If so, you may ask them.

(Testimony of J. Stanley Huckaba.)

Redirect Examination

By Mr. Crosby:

Q. Would you please, Mr. Huckaba, explain the chassis, the size of the chassis for both pieces of equipment, that is, Item 1 listed on Exhibit A-11 and Item 1 listed on Exhibit No. 1? Any difference in the size of the chassis of the equipment?

A. I'll have to answer I don't know, because I don't understand what you're referring to by——

Q. The framework of the equipment.

A. I'll have to say I don't know. I don't have the dimensions here.

The Court: If you can do so of your own knowledge the Court asks you to state each and all of the differences in the identity of the two machines which occur to you at this time.

A. Well, the Size 3——

The Court: What are you referring to by "Size 3"? What exhibit is that in, if it is in either one?

A. In Defendant's Exhibit A-11 I refer to a Size one only 3-C, which means Size No. 3, [93] coal.

The Court: 103-C?

A. No, Size No. 3.

The Court: Oh, Size No. 3.

A. Yes.

The Court: All right. What does that mean?

A. Is a certain specification for a plant which will under normal circumstances treat about fifty tons per hour of coal, and consequently the equip-

(Testimony of J. Stanley Huckaba.)

ment contained in this type of plant is proportionately smaller than the equipment contained in the plant quoted in Plaintiff's Exhibit No. 1, which is a 3-C, Size No. 3-C modified, which means particularly that it's half way in size between a No. 3 plant and a No. 4 plant, and essentially the equipment contained in a No. 3 modified plant is suitable and a suitable size to treat about eighty tons of coal per hour under normal conditions.

The Court: The other one was fifty tons per hour and this is eighty tons, is that right?

A. Yes, sir.

The Court: Do you know of any other differences between the two machines, the one in Defendant's Exhibit A-11 and the one mentioned in Plaintiff's Exhibit 1?

A. There is of course a difference in the [94] sizes of individual equipment which I could enumerate if you wish.

The Court: If you can do so, please proceed.

A. Well, in the No. 3 Mobil Mill the drum separator or the separating vessel would be six feet in diameter by five feet long.

The Court: In what exhibit is that?

A. Defendant's Exhibit A-11. The medium or product screen has a 4 by 16 Allis Chalmers low head screen, a four inch medium return pump, while the plant mentioned in Plaintiff's Exhibit No. 1, the Size 3-C modified, contains an eight foot diameter by six foot long drum separator, a five

(Testimony of J. Stanley Huckaba.)

foot wide by 16 foot long Allis Chalmers product screen, and—oh, yes, a five inch medium circulating pump. That is essentially the difference in the machinery contained in the two plants, although there are other items contained which are essentially the same size.

The Court: Sometimes the Court does not readily understand why Counsel on both sides omit to develop information like this which is so important in a situation like that presented here. Does any one of Counsel wish to ask another question of this witness?

Mr. Crosby: Not in connection with these two quotations. [95]

The Court: Mr. Shapro?

Mr. Shapro: No, no further questions.

The Court: The Court is ready to rule finally on the matter of the proper admission in evidence and the correctness of the Court's last announced ruling by which the Court admitted Defendant's Exhibit A-11 in evidence. The Court strikes the Court's ruling previously announced admitting in evidence Defendant's Exhibit A-11. The same is rejected.

(Defendant's Exhibit No. A-11 for identification was rejected.)

Mr. Crosby: Your Honor, might I point out to the Court—

The Court: I have heard the facts, and even if you have something further to add I doubt that it

(Testimony of J. Stanley Huckaba.)

would change the Court's mind. We have already heard a good deal of comment from Counsel, Mr. Crosby. Unless you have a court case, like the Ninth Circuit, or a Supreme Court ruling which you believe honestly and sincerely controls this Court's specific ruling just now made, I do not wish to take up the time.

Mr. Crosby: I do, your Honor.

The Court: What is it?

Mr. Crosby: With reference to the Ninth [96] Circuit case of Howell vs. War Finance Corporation——

Mr. Koch: Is that in your brief?

Mr. Crosby: That is in the brief.

The Court: On the first page at the top of the page of the defendant's brief.

Mr. Crosby: Yes.

The Court: What are the facts in that case? How did the question arise? It causes a lot of discussion, but we will have to have it if you feel sincerely that it is controlling of this Court's particular ruling on this particular thing.

Mr. Crosby: Your Honor, in that case a party obtained a loan from a bank and that bank loan was eventually assigned to the defendant War Finance Corporation, and the lender was the only one shown on the loan. However, it was later developed and the Court permitted it by parol evidence that the loan was obtained for the purpose of still a third party, and the Court treated the lender as the surety and the third party as the principal. And the same similar facts were in Hoff-

(Testimony of J. Stanley Huckaba.)

man vs. Habighorst, which is the Oregon case quoted by the Ninth Circuit case which the Ninth Circuit says is the leading case, where the Court again permitted the parties who were stockholders of a corporation and the sole parties signing on a note to come [97] in and show that when making the loan the lender was advised that the corporation was to receive the funds, was the beneficiary of the loan.

The Court: Did you understand that any one of these cases involved one and the same piece of property?

Mr. Crosby: No, your Honor.

The Court: I am talking about these two cases.

Mr. Crosby: The Howell vs. War Finance case involves a separate set of circumstances than the Hoffman vs. Habighorst case. They are two separate cases, your Honor.

The Court: That isn't what I mean. I mean did the Howell case involve one piece of property or did it involve two pieces or more pieces of property?

Mr. Crosby: Well, it involved several pieces of property, your Honor, but they were all the subject of one transaction. However, in the Hoffman case there was only one instrument. That was the——

The Court: I would take it that that would be a much easier case, if you had the facts here, if it were the proof here that Defendant's Exhibit A-11 and Plaintiff's Exhibit 1 involve one and the same piece of property, Mr. Crosby, I say to

(Testimony of J. Stanley Huckaba.)

you as indicated [98] by the Court's first ruling admitting Exhibit A-11 that the Court would have a view different from this expressed finally.

Mr. Crosby: Well, your Honor, on Page 2 of No. 1 the witness stated that the two items on that page which are \$3,100 and \$3,600 are exactly the same as the items on Page 2 of Defendant's A-11, so that as for those——

The Court: I have been trying to get from this witness and from Counsel for about an hour now what is the fact about what is involved in the way of identity of property in the two exhibits.

Mr. Crosby: Well, your Honor, when we were speaking of Items 2 and 3 on A-11 the witness stated that they were exactly the same as Items 3 and 4 on No. 1, but in the last series of questions we were directing our questions I understood only to Item 1.

Mr. Shapro: That's right.

Mr. Crosby: But I'm sure, your Honor, that the testimony is unequivocal that as to Items 2 and 3 on A-11 they are exactly the same.

The Court: I am going to give Counsel in this case about three more minutes to develop the facts in this thing. I wish you would do so, if it has not already been done. Mr. Shapro, is there any other [99] question of this witness about the identity of this property?

Mr. Shapro: None whatsoever, your Honor, none whatsoever.

The Court: Then what have you to say about

(Testimony of J. Stanley Huckaba.)

the identity of the property? The Court's ruling proceeds upon the basis and it only is with respect to properties described in Plaintiff's 1 and Defendant's A-11 which is different. To the extent that these two exhibits involve one and the same property I do not intend to exclude the exhibit.

Mr. Shapro: I believe I understand your Honor's ruling and so that there may be no misunderstanding I agree with Mr. Crosby—this is the first time we have agreed on anything—I agree with Mr. Crosby that Items 3 and 4 on Plaintiff's Exhibit 1 and Items 2 and 3 on Defendant's Exhibit A-11 as the witness has testified are identical, but the Item 1 on both is vastly different. May I add, your Honor, to that observation that by reason of the difference between the Items No. 1 on both of the exhibits there is a difference of over \$11,000 in the quoted price.

The Court: Is it your view that only as to Item No. 1 are the two exhibits different?

Mr. Shapro: Yes, your Honor. [100]

The Court: The Court's ruling is confined to Item 1 in each of the two exhibits. As to other items mentioned in the two exhibits, they will remain in evidence.

(Page 2 of Defendant's Exhibit No. A-11 for identification was admitted in evidence.)

The Court: Is that clear to Counsel?

Mr. Shapro: Yes, it is, your Honor.

Mr. Crosby: Yes, your Honor. Thank you.

(Testimony of J. Stanley Huckaba.)

The Court: That is the final ruling of the Court on this matter. At two o'clock we have to make some other arrangements about the calendar and I will have to excuse Counsel and the witness for a moment. So far as the Court is concerned we will take about a three-minute recess before resuming this further proceeding. Counsel are excused for at least ten minutes, I believe. If it is earlier I will try to notify you.

Mr. Shapro: Thank you, your Honor.

(Short recess.)

The Court: All are present as before the recess. The Court will further clarify the Court's ruling concerning the admission in evidence of what was at the time the Court last made a statement Defendant's Exhibit A-11 by stating the same result [101] as that last stated but in a different form in this manner: That A-11 by and with the consent of Counsel has been separated so as to give a new number to that part of what was A-11 but which part was rejected when last offered in evidence, and that new number assigned by the clerk is Defendant's Exhibit A-11-X, and in harmony with what the Court has already said, that part of what was Defendant's Exhibit A-11 and is now Defendant's Exhibit A-11-X is rejected. Further clarifying, what now is A-11 is admitted in evidence. There is no ruling changing the Court's former ruling admitting Plaintiff's Exhibit 1 in evidence. You may proceed.

(Testimony of J. Stanley Huckaba.)

Mr. Crosby: I would like to have handed to the witness Defendant's Exhibits A-1 and A-2 and A-3.

The Court: That will be done.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. Huckaba, during your negotiations with Mr. McMillan did you make any reports to the San Francisco office of Western Machinery Company relative to your negotiations with Mr. McMillan? A. Yes.

Q. Referring to Defendant's Exhibits A-1, A-2 and A-3, are there notes on those exhibits relative to your negotiations with Mr. McMillan?

A. Yes. [102]

Q. And are those notes relative to the equipment shown on Defendant's Exhibit A-11 and on Items 3 and 4 of Plaintiff's Exhibit 1?

A. There are notes in Defendant's Exhibit A-1 concerning the equipment that was quoted in the quotation marked Defendant's Exhibit A-11.

Mr. Shapro: Your Honor, may the witness see A-11 as it now stands?

The Court: Yes.

Mr. Shapro: I'm not sure that he understands what was done.

(Defendant's Exhibit A-11 was handed to the witness.)

The Court: What you now have is one sheet of paper. That is all there is of A-11 left in the exhibit to be known as such.

(Testimony of J. Stanley Huckaba.)

A. I would like to modify my statement, saying that I see no reference specifically to A-11 in these sales report forms.

Q. (By Mr. Crosby): Your notes in A-1, -2 and -3 then refer to your negotiations with Mr. McMillan concerning the sale of equipment to Bellingham Coal Mine Company? A. Yes.

Q. What is the nature of the notes which you refer to?

Now, specifically with reference to Defendant's Exhibit [103] A-1, please refer to the note on that exhibit.

The Court: But do not read it out loud in evidence, because it is not in evidence.

Q. (By Mr. Crosby): Please refer to the note on that exhibit relative to the sale of equipment to Bellingham Coal Mine Company.

The Court: By "nature" I think Counsel means to include "subject matter."

Mr. Crosby: Yes.

A. May I make a correction in this? A-1 is written concerning Northwestern Improvement Company. A-2 and A-3 are written to Bellingham Coal Company. You're referring now to A-1?

Q. (By Mr. Crosby): A-1, yes. Are there any notes on A-1 with reference to sale of equipment to Bellingham Coal Mine? A. No.

Q. Are there any notes there with reference to your negotiations with Mr. McMillan concerning the sale of equipment to be placed in the Bellingham Coal Mine? A. Yes.

(Testimony of J. Stanley Huckaba.)

Q. What is the subject matter of the note on Exhibit A-1 with reference to the negotiations with Mr. McMillan for the sale of equipment to be put in the Bellingham Coal Mine? [104]

The Court: What type of information is disclosed by the note to a stranger looking at it? You don't have to say what the information is, but what type of information is it, what is its nature?

A. The nature of the information concerning Bellingham Coal Mines Company?

Q. (By Mr. Crosby): Concerning the equipment which was——

The Court: That is leading again, Mr. Crosby.

Mr. Crosby: I'm sorry. I will strike that.

The Court: Try to avoid leading.

Q. (By Mr. Crosby): What is the subject matter and the nature of the note, Mr. Huckaba?

A. The only matter mentioned is the mention of Mr. McMillan consulting with the Board of Directors of Bellingham Coal Mine Company. That's the only mention.

Q. For what purpose?

Mr. Shapro: That's leading, if your Honor please. Furthermore, that's giving the contents of a document that hasn't been received in evidence.

The Court: The objection is sustained. The purpose will have to be observed from the writing.

Q. (By Mr. Crosby): Now, with reference to Exhibit A-2, Defendant's A-2, is there any note on A-2 which refers to your negotiations with Mr. McMillan and the furnishing of equipment to be placed

(Testimony of J. Stanley Huckaba.)

in the coal mine [105] of Bellingham Coal Mine at Bellingham, Washington? A. No.

Q. Does the exhibit refer in any place to your negotiations with Mr. McMillan or with the furnishing of equipment to the Bellingham Coal Mine Company?

Mr. Shapro: I submit, if your Honor please, the question has been asked and answered and also is in the nature of impeachment of his own witness, cross-examination of his own witness.

The Court: What have you to say to the last statement, Mr. Crosby?

Mr. Crosby: I submit—

The Court: The objection is overruled. Do you have in mind the question? If you don't we will have it read.

A. Will you read the question?

The Court: Please read the question, Mr. Reporter.

(The reporter read the last question.)

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Crosby): What is the nature of the reference, Mr. Huckaba?

Mr. Shapro: Without giving the contents of the document. [106]

The Court: Yes, avoid saying what the information is stated in the reference. What is the nature of the reference?

A. The nature of the reference is regarding a

(Testimony of J. Stanley Huckaba.)

meeting of the Board of Directors of the Bellingham Coal Mines Company.

Q. (By Mr. Crosby): Referring to Defendant's Exhibit A-3, is there any reference on that exhibit which refers to the furnishing of the equipment which was the subject of your negotiations with Mr. McMillan for the Bellingham Coal Mine Company?

A. There is a note regarding a Board of Directors meeting of the Bellingham Coal Mines Company.

The Court: In what exhibit?

A. It's on Exhibit A-3.

Mr. Crosby: May the witness now have Exhibits A-12 and A-13?

(The exhibits referred to were handed to the witness.)

Q. (By Mr. Crosby): To what does Exhibit A-13 refer, Mr. Huckaba?

A. Exhibit A-13 refers specifically to a quotation I made to Mr. McMillan dated January 16, 1952.

Q. Is there any reference in Exhibit A-13 to the equipment listed on Defendant's Exhibit [107] A-11?

A. Yes.

Mr. Crosby: I would like to ask that Defendant's Exhibit A-13 be admitted in evidence. It pertains to the subject matter of the equipment quoted in Mr. Huckaba's quotations shown in Defendant's Exhibit A-11 and Plaintiff's Exhibit No. 1, a portion of No. 1.

(Testimony of J. Stanley Huckaba.)

Mr. Shapro: Your Honor, we have no objection to the receipt in evidence of Defendant's Exhibit A-13 other than and subject to the same objections that we made with respect to that part of A-11 which was admitted in evidence by your Honor over our objections.

The Court: Do you offer it for the same purpose as that for which the Court admitted A-11, namely the purpose of showing that whatever it did in this case and respecting the transaction involved in this case by the defendant, it did it as the agent of someone else?

Mr. Crosby: That is right, your Honor. It pertains to——

The Court: Is that the purpose for which you offer it?

Mr. Crosby: It pertains to our affirmative defenses, your Honor.

Mr. Koch: That isn't specific enough. [108]

The Court: I wish to know——

Mr. Crosby: It pertains to the affirmative defenses.

The Court: Which affirmative defenses?

Mr. Crosby: Affirmative Defenses Nos. 1 and 4, your Honor.

The Court: What do you understand those defenses to be? State what each is.

Mr. Crosby: Affirmative Defense No. 1, your Honor, states that the Northwestern Improvement Company received no consideration for the subject matter of the lawsuit, which is the machinery, and

(Testimony of J. Stanley Huckaba.)

that as to the question of suretyship which is stated in Affirmative Defense No. 4, that the Bellingham Coal Mines Company is the true principal for the transactions involved.

The Court: Does either one of these defenses allege in addition to suretyship that you keep referring to anything regarding the relationship of principal and agent between the Bellingham Coal Mines Company and—

Mr. Crosby: No.

The Court: I understood it did.

Mr. Crosby: Not as far as principal and agent.

The Court: You have alleged suretyship, is that right? [109]

Mr. Crosby: It is our contention that if the Northwestern Improvement Company is obligated, it is as a surety, and that the Bellingham Coal Mine Company is the true principal.

The Court: For that limited purpose mentioned, namely as evidence of the allegations in defendant's Affirmative Defense No. 1 and Affirmative Defense No. 4, and only that, Defendant's Exhibit A-13 is now admitted.

(Defendant's Exhibit No. A-13 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Huckaba, referring to Defendant's Exhibit A-12, would you please state the nature of that exhibit?

Mr. Shapro: Your Honor, to save a little time, we are familiar with it, we have no objection to the

(Testimony of J. Stanley Huckaba.)

introduction in evidence of Exhibit A-12 subject to the same reservation that I made with respect to A-13.

Mr. Crosby: That is satisfactory with me, your Honor.

The Court: And you so offer it?

Mr. Crosby: I so offer it, your Honor.

The Court: Defendant's Exhibit A-12 is now offered as evidence of the allegations in [110] defendant's Affirmative Defenses 1 and 4, and for that purpose only it is admitted.

(Defendant's Exhibit No. A-12 for identification was admitted in evidence.)

Mr. Crosby: Then I would like to also offer Defendant's Exhibits A-1, -2 and -3 for the same purpose.

Mr. Shapro. To which offer, your Honor, we object most strenuously upon the ground that there has been no proper foundation laid. There is no identity of description, no identity of subject matter in Exhibits A-1, A-2 and A-3 with Exhibit A-11, none whatsoever. The witness has so testified and the documents so show.

Mr. Crosby: Your Honor, Plaintiff's Exhibit No. 2, which is admitted in evidence, states, "As you know, this equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager * * *" and Exhibits Nos. A-12 and A-13 make similar reference, and the

(Testimony of J. Stanley Huckaba.)

notes of Mr. Huckaba which are Exhibits A-1, -2 and -3 have similar references.

Mr. Shapro: No your Honor, such is not the fact. Exhibits A-12 and A-13——

The Court: Let defendant's Counsel see [111] them.

(The exhibits referred to were handed to Mr. Shapro.)

Mr. Shapro: Exhibits A-12 and A-13 that have been admitted for that limited purpose refer to the quotation of January 16th, which is A-11. That is, one page of it is A-11. The Exhibits A-1, A-2 and A-3 predate Exhibit A-11 and have no reference whatever to the subject matter, namely the two items of equipment that are on the page marked A-11, none whatsoever.

Mr. Crosby: Defendant's Exhibit No. A-13, which is admitted in evidence for a limited purpose, is a letter dated January 22, 1952, states, "We also accept the proposal to furnish to Bellingham Coal Mines the following additional equipment * * *" and the two items—the three items listed there are the items shown on Defendant's Exhibit A-11.

Mr. Shapro: That is correct.

Mr. Crosby: They are itemized.

Mr. Shapro: That is correct.

Mr. Crosby: Likewise Defendant's Exhibit A-12, which is admitted in evidence for a limited purpose, states, "Owing to the fact that it has been necessary for the Board of Directors of the Bellingham Coal

(Testimony of J. Stanley Huckaba.)

Mines Company to postpone their meeting [112] until sometime during the week of February 4th, it will therefore be impossible to get the Board's approval of our order with you within the ten day option."

Now, those are the exact subject matters which Mr. Huckaba stated were subject matters of his notes which are shown on Defendant's Exhibits A-1, -2 and -3.

Mr. Shapro: Your Honor, could I ask the bailiff to hand those Exhibits A-1, -2 and -3 to your Honor? There is no descriptive matter in there concerning those items of equipment. Counsel misstates it.

(The exhibits referred to were handed to the Court.)

Mr. Crosby: They refer, as I stated, to the references in the letters. I would like to——

The Court: Where do you find that?

Mr. Crosby: On A-1, your Honor, the last paragraph which states, "Sorry about." It refers to the ten day cancellation notice which is referred to in Defendant's Exhibit A-13.

The Court: May I see that, A-13.

(Defendant's Exhibit No. A-13 was handed to the Court.)

Mr. Crosby: The last paragraph of A-13.

The Court: Did you note that, Mr. [113] Shapro?

(Testimony of J. Stanley Huckaba.)

Mr. Shapro: Yes, but I still maintain, your Honor, there is no reference to the description of any equipment in Exhibit A-1, none whatsoever. The only similarity is that there is a reference to a ten day delay. Now, your Honor has admitted A-13 because it identifies the very same equipment which is on A-11.

The Court: And not for any other purpose?

Mr. Shapro: And not for any other purpose, that's right, your Honor.

Mr. Crosby: Your Honor——

Mr. Shapro: I mean the limited purpose that your Honor stated, yes.

The Court: What was the limited purpose then as you understood it?

Mr. Crosby: For the purpose of proving our Affirmative Defenses Nos. 1 and 4. That same paragraph, your Honor, also——

The Court: The objection to A-1 will have to be overruled. I didn't quite understand one thing, though. Is the offer for the purpose only of furnishing evidence as to Defenses 1 and 4?

Mr. Crosby: That is right, your Honor.

The Court: Very well. Defendant's Exhibit A-1 is now admitted in evidence, limited in its evidentiary purpose and use to the defendant's [114] Defenses 1 and 4.

(Defendant's Exhibit No. A-1 for identification was admitted in evidence.)

(Testimony of J. Stanley Huckaba.)

The Court: Now, with respect to A-2.

Mr. Crosby: A-2, your Honor, I would like to direct your attention——

The Court: A-2 is in two pages, two sheets. Is there any objection to that offer?

Mr. Shapro: Yes, your Honor, the same objection as to A-1 again.

The Court: What is the similarity?

Mr. Crosby: Your Honor, on the second page there is a note about three-fourths of the way down——

The Court: “Mine”—m-i-n-e—“is closed”?

Mr. Crosby: I’m sorry, your Honor, the photostatic copies——

The Court: M-i-n-e?

Mr. Crosby: No, the photostatic copies I have, your Honor, were given to me. They are in a little different form than those, the pages are different.

The Court: Read it, please.

Mr. Crosby: I’m referring to a note. It says “Note” about three-quarters of the way down and underlined. [115]

The Court: I don’t see it. I can’t pick it up. A-3 is one that has a note.

Mr. Crosby: All right, your Honor, the ones that were furnished to me, the pages were different. I’m sorry. I was referring to A-3.

The Court: The Court will abandon the Court’s question about A-2. I ask you, is there an offer of Defendant’s Exhibit A-3 for the same limited purpose, namely as evidencing the allegations set out in

(Testimony of J. Stanley Huckaba.)

defendant's Affirmative Defenses No. 1 and No. 4?

Mr. Crosby: That is right, your Honor.

The Court: Any objection?

Mr. Shapro: We object, if your Honor please, upon the same grounds as before, namely that there is no identity of subject matter so far as the equipment is concerned in A-3 with the subject matter of A-11 and Plaintiff's Exhibit 1.

The Court: What is your response to that?

Mr. Crosby: Your Honor, the note refers to the same subject matter that is referred to——

The Court: The directors?

Mr. Crosby: The action of the directors of the Bellingham Coal Mine Company.

The Court: What is the next word?

Mr. Crosby: "The directors meeting of the [116] Bellingham" is the first line.

The Court: The objections are overruled. For the limited purpose offered, A-3 is now admitted.

(Defendant's Exhibit No. A-3 for identification was admitted in evidence.)

Mr. Shapro: Your Honor, Exhibit A-2 was offered, to which we objected. May we have a ruling on that, your Honor?

The Court: I want to know if there is anything on that that refers to——

Mr. Crosby: Your Honor, with reference to the first page down about two-thirds of the way where there are listed Items 1, 2 and 3, above that it says, "I have proposed to Rod——."

(Testimony of J. Stanley Huckaba.)

The Court: "That is the first page?"

Mr. Crosby: Yes, the first page, and Item 3—or, "I have proposed to Rod—1. We go—" and so on.

Mr. Shapro: Those items, your Honor, the witness has testified refer to a construction job of the Western Engineering Division, not a washing plant for the Bellingham Coal Mines.

Mr. Crosby: "We go to Seattle and talk to Mc-Millan."

Mr. Shapro: Again, your Honor, the witness testified it was a construction job, not this [117] washing plant equipment at all.

Mr. Crosby: If there is any doubt about it we would like to inquire of the witness.

The Court: You may inquire further. Let the witness see the exhibit.

(Defendant's Exhibit No. A-2 for identification was handed to the witness.)

Q. (By Mr. Crosby): Mr. Huckaba, referring to Defendant's Exhibit A-2, about two-thirds of the way down where there are a series of three notes numbered, do those notes refer to the transaction about which you have been testifying, your negotiations with Mr. McMillan?

Mr. Shapro: On the—may I qualify it, your Honor? On the washing plant for the Bellingham Coal Mines.

Q. (By Mr. Crosby): Yes, on the washing plant for Bellingham Coal Mine Company.

(Testimony of J. Stanley Huckaba.)

A. They refer specifically to a construction job I'm discussing here.

The Court: And where was that, if you recall?

A. A construction job at the Bellingham Coal Mines Company property and referring——

The Court: What was that as compared with the sale of merchandise involved in Plaintiff's [118] Exhibits 1 and 2?

A. This specifically refers to the construction of the building and the placement of equipment.

The Court: What equipment?

A. The equipment, or the coal washing plant, which would be—in a sense the answer to your question would be yes.

Q. (By Mr. Crosby): Then referring to the last paragraph there where it says, "Sam Moses & myself," is your answer to that the same, that that last paragraph also refers to the installation and the equipment——

The Court: I think you should ask him to what it refers.

Mr. Crosby: Sorry, your Honor.

Q. (By Mr. Crosby): To what does that refer, the last paragraph on the first sheet of Defendant's A-2? The first sheet. The last paragraph on the first sheet, Mr. Huckaba.

A. It refers to a trip that Mr. Moses and I took to Bellingham, and I took some pictures there of the existing tipple with reference to having the construction division of Western Machinery Company

(Testimony of J. Stanley Huckaba.)

construct additional facilities required for treating of the coal at that mine. [119]

Mr. Crosby: I make an offer of Defendant's Exhibit A-2 for the limited purpose similar to A-1 and A-3.

Mr. Shapro: To which we object, if your Honor please, upon the ground no proper foundation has been laid as to identity, and as a matter of fact that the evidence shows that the subject matter in essence is something foreign to this action, namely a construction job that was never undertaken by the plaintiff.

The Court: The objection is overruled, and for the limited purpose offered Defendant's Exhibit A-2 is now admitted in evidence.

(Defendant's Exhibit No. A-2 for identification was admitted in evidence.)

Mr. Crosby: I have no further questions of this witness, your Honor.

The Court: You may examine.

Mr. Shapro: Yes, your Honor. I ask that this document be identified.

The Clerk: It will be marked Plaintiff's Exhibit No. 6.

(A sales report dated Feb. 2, 1952, was marked Plaintiff's Exhibit No. 6 for identification.) [120]

(Testimony of J. Stanley Huckaba.)

Recross-Examination

By Mr. Shapro:

Q. Mr. Huckaba, I ask you to examine Plaintiff's Exhibit 6 and ask if that was written by you?

A. Yes, sir.

Q. Was anything to your recollection enclosed with the document marked Plaintiff's Exhibit 6?

A. Yes, sir.

Q. What document? A. A letter.

Q. A letter. Which letter? Can you identify it by exhibit number?

Mr. Shapro: May the witness be shown Exhibits A-12 and A-13, your Honor?

The Court: Yes, that may be done.

(The exhibits referred to were handed to the witness.)

A. It contained Defendant's Exhibit A-12.

Mr. Shapro: At this time we offer in evidence, if your Honor please, Plaintiff's Exhibit 6.

Mr. Crosby: I have no objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Q. (By Mr. Shapro): Mr. Huckaba, will you examine—— [121]

The Court: What do you call that, Mr. Huckaba, referring to Plaintiff's Exhibit 6?

A. This is a sales order form that was written

(Testimony of J. Stanley Huckaba.)

by myself as an explanation of Defendant's Exhibit A-12 asking that they grant the request to delay——

The Court: What I want is a name for the paper.

A. Sales report form.

The Court: Sales order form——

A. Report form.

The Court: Sales order report form?

A. Sales order form—excuse me, sorry. Sales report form.

Q. (By Mr. Shapro): Mr. Huckaba, will you again examine Plaintiff's Exhibit No. 1, and can you tell the Court the reason for the change of name from Bellingham Coal Mines Company to Northwestern Improvement Company appearing upon the face of Plaintiff's Exhibit No. 1? Answer that question yes or no, please. A. Yes.

Q. Will you tell the Court the reason?

Mr. Crosby: I object to that question as already covered. In plaintiff's direct examination this witness stated he didn't know the reason for the [122] change.

Mr. Shapro: He did no such thing, your Honor. He merely testified that he got it back with a rubber stamped name over it. The question of the reason was never gone into on our case at all. Now I'm cross-examining this witness who was offered by the defendant on the subject matter of incidentally the affirmative Defenses Nos. 1 and 4.

The Court: The objection is overruled.

A. During the final negotiations for the place-

(Testimony of J. Stanley Huckaba.)

ment of the order which occurred on February 22 as quoted in Plaintiff's Exhibit No. 1 the matter of credit or the ability of Bellingham Coal Mines Company to purchase a plant arose, and naturally the investigation of the credit of Bellingham Coal Mines Company would have taken a matter of two to three weeks, and due to the fact that it was a newly organized company I felt that credit for Bellingham Coal Mines Company would not be extended by our San Francisco office, and knowing that Northwestern Improvement Company was a well financed company and well able to place an order on open account I asked Mr. McMillan to place the order in Northwestern Improvement Company's name.

Mr. Shapro: No further questions.

Mr. Crosby: I have no questions. [123]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Crosby: Mr. McMillan.

EARL R. McMILLAN

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crosby:

Q. Would you please state your name?

A. Earl R. McMillan.

Q. And your address?

(Testimony of Earl R. McMillan.)

A. 1012 Smith Tower, Seattle.

Q. That is your business address?

A. Yes, sir.

Q. Mr. McMillan, what if any business capacity did you have with the Bellingham Coal Mines Company?

A. I was manager of coal operations.

Q. During what period?

A. Beginning January 1, 1952, and continuing through 19—until early 1955.

Q. Did you have any other capacity with that company?

A. I was a member of the Board of Directors, or a member of the Board. [124]

Q. During what period?

A. From the time of incorporation of the company, which was on or about November 1, 1951, until some time late in 1954.

Q. At any time did a representative of the Western Machinery Company contact you concerning the furnishing of equipment to the Bellingham Coal Mine Company? A. Yes, sir.

Q. And who was that?

A. Mr. Huckaba.

The Court: You don't speak the name very plainly and distinctly. What is the name?

A. Mr. Huckaba.

The Court: Thank you.

Q. (By Mr. Crosby): Approximately when did Mr. Huckaba contact you?

(Testimony of Earl R. McMillan.)

A. It was some time early in January of 1952, is my recollection.

Q. Was this a personal call in person? Did Mr. Huckaba come to see you in person or was it a telephone call?

Mr. Shapro: I object to the form of the question, your Honor, on the ground it is leading.

The Court: It is. Objection sustained.

Q. (By Mr. Shapro): How did Mr. Huckaba contact you?

A. I don't recall whether it was preceded by a telephone [125] call or not, but he came in person to see me early in January.

Q. Where did he see you early in January?

A. He came to see me in the Smith Tower in Seattle.

Q. What did Mr. Huckaba say was the purpose of his call?

Mr. Shapro: If your Honor please, if he is going to ask for conversation I'm going to object to asking him for parts of it on the ground it is leading.

The Court: Yes; that objection is sustained.

Q. (By Mr. Crosby): What was discussed? Did you have any discussions with Mr. Huckaba at that time? A. Yes, sir.

Q. What were the nature of those discussions?

Mr. Shapro: I think the question should be the substance of them or the discussions themselves.

The Court: The objection is sustained. Ask him what if anything he said and what if anything Mr. Huckaba said, if he can recall; and if he can't

(Testimony of Earl R. McMillan.)

recall, state the substance of what each one said, something like that, Mr. Crosby.

Mr. Crosby: Thank you, your Honor.

Q. (By Mr. Crosby): If you recall, Mr. McMillan, what was the substance of what Mr. Huckaba said at the time he came to see you in the Smith Tower in early January of 1952? [126]

Mr. Shapro: I want to object again, if your Honor please, upon the ground that the question is leading and suggestive. He should call for the entire conversation, not just one half of it.

The Court: Did you confine his answer to a certain subject?

Mr. Crosby: No; I did not, your Honor.

Mr. Shapro: Yes; what one person said, what Mr. Huckaba said.

Mr. Crosby: What Mr. Huckaba said.

The Court: The objection is overruled.

The Witness: Will you read the question back again, please?

(The reporter read the question back as follows:

“Q. If you recall, Mr. McMillan, what was the substance of what Mr. Huckaba said at the time he came to see you in the Smith Tower in early January of 1952?”)

A. The substance of the call was to inquire whether or not the Bellingham Coal Mines Company would be interested in the purchase of a heavy media separation plant, which is a type of

(Testimony of Earl R. McMillan.)

coal cleaning plant, and if so he would like to promote or make a proposal to furnish [127] such a plant.

Q. (By Mr. Crosby): And what did—is that all that you have on his conversation?

A. That was the purpose of his call, and my answer to that was that a proposal would certainly be given due consideration. I thought the Bellingham Coal Mines Company would be interested in installing that type of equipment.

Q. Were there any subsequent conversations, personal conversations between you and Mr. Huckaba prior to January 16th of 1952?

A. I don't recall just what dates. We had frequent conversations, some by telephone, long distance telephone between Seattle and Spokane. Mr. Huckaba agreed at the conclusion of our first discussion to submit a proposal, which was on or about January 15, 1952.

Q. Referring to Defendant's Exhibit A-11, do you recognize that Exhibit, Mr. McMillan?

A. Yes, sir.

Q. Prior to receiving that exhibit were there any other discussions of the subject matter discussed between yourself and Mr. Huckaba?

Mr. Shapro: I submit, if your Honor please, an objection to the question that it is leading and suggestive. [128]

Mr. Koch: It was just covered in the preceding two questions ago and now he's going over it again. He didn't get what he wanted.

(Testimony of Earl R. McMillan.)

The Court: I think the latter—however, let one Counsel conduct the matter. If Mr. Shapro is conducting the examination and the cross-examination, I prefer to hear him without assistance, but if Mr. Koch undertakes similar work with respect to the witness—

Mr. Koch: No, your Honor.

The Court: That is quite agreeable to the Court, too. This objection is sustained.

Q. (By Mr. Crosby): What office is at 909— or pardon me, in the Smith Tower where you and Mr. Huckaba had the meeting that you mentioned?

A. The meeting was in Room 1012 Smith Tower.

Q. Whose business office is that?

A. The Northwestern Improvement Company. It also served as the Seattle office of the Bellingham Coal Mines Company.

Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object on the ground it is leading and suggestive. [129]

Mr. Crosby: I think it is perfectly proper, your Honor. I haven't asked for the substance of the conversation. It is perfectly proper cross-examination.

The Court: Read the question, please, Mr. Reporter.

(The reporter read the last question as follows:

(Testimony of Earl R. McMillan.)

coal cleaning plant, and if so he would like to promote or make a proposal to furnish [127] such a plant.

Q. (By Mr. Crosby): And what did—is that all that you have on his conversation?

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Q. Referring to Defendant's Exhibit A-11, do you recognize that Exhibit, Mr. McMillan?

A. Yes, sir.

Q. Prior to receiving that exhibit were there any other discussions of the subject matter discussed between yourself and Mr. Huckaba?

Mr. Shapro: I submit, if your Honor please, an objection to the question that it is leading and suggestive. [128]

Mr. Koch: It was just covered in the preceding two questions ago and now he's going over it again. He didn't get what he wanted.

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A. The Northwestern Improvement Company. It also served as the Seattle office of the Bellingham Coal Mines Company.

Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object on the ground it is leading and suggestive. [129]

Mr. Crosby: I think it is perfectly proper, your Honor. I haven't asked for the substance of the conversation. It is perfectly proper cross-examination.

The Court: Read the question, please, Mr. Reporter.

(The reporter read the last question as follows:

(Testimony of Earl R. McMillan.)

("Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?")

The Court: The objection is overruled.

A. The answer is yes.

Q. (By Mr. Crosby): Would you please state what you said in that regard and what Mr. Huckaba said, if anything, in that regard?

A. Well, in substance I explained to Mr. Huckaba first that the Bellingham Coal Mines Company was a newly organized company, had taken over the property and mine of the former Bellingham Coal Mine, and that Northwestern Improvement Company had agreed to operate the mine for the Bellingham Coal Mines Company under a contract for a fixed fee and that the Northwestern Improvement Company had no financial interest in the [130] Bellingham Coal Mines Company and that Northwestern Improvement Company under this management agreement was proceeding to rehabilitate and operate the mine for the Bellingham Coal Mines Company.

Q. Following your receipt of Defendant's Exhibit No. A-11 did you do anything further in connection with that exhibit?

Mr. Crosby: May the witness be handed Defendant's Exhibits A-12 and A-13?

(The bailiff did as requested.)

(Testimony of Earl R. McMillan.)

Q. (By Mr. Crosby): Again, Mr. McMillan, following your receipt of Defendant's Exhibit No. A-11, what if anything further did you do in connection with that exhibit?

A. I wrote a letter to Western Machinery Company in care of Mr. Huckaba at Spokane.

Q. Is that one of the exhibits that you have?

A. It's the exhibit marked A-13.

Q. Following your writing of Exhibit A-13 did you do anything else, anything further in connection with Defendant's Exhibit No. A-11?

A. Yes, sir.

Q. What was that?

A. I wrote a letter on January 29, 1952, to Western Machinery Company, attention Mr. Huckaba. It's marked Defendant's Exhibit A-12. [131]

Q. Now, following the sending of that correspondence did you have any further meetings or conversations with Mr. Huckaba, that is in the immediate future during the latter part of January, 1952, or the early part of February, 1952?

A. Yes, sir.

Q. Please state what meetings you had and where they were.

A. I don't recall the number of meetings. We had several meetings. Some were in Seattle, some were in Bellingham.

Q. Where were the meetings in Bellingham?

A. At the Bellingham Coal Mines Company mine.

Q. I see. Could you give the approximate

(Testimony of Earl R. McMillan.)

number of times you and Mr. Huckaba went up to the Bellingham Coal Mine?

A. No; I can't give the approximate number of times. We made several trips to the mine, some before and some after the starting of construction, or the installation of equipment.

Q. What if anything was discussed with Mr. Huckaba at those meetings and trips to Bellingham? A. Well, shortly following—

Mr. Shapro: If your Honor please, I'm going to ask your Honor to ask counsel to divide the question with respect to before or after the time of Plaintiff's [132] Exhibit No. 1, because I may have objection to offer if it refers to anything prior to February 20, 1952.

Mr. Crosby: I think that is perfectly proper and I will do so, your Honor.

The Court: Very well.

Q. (By Mr. Crosby): Mr. McMillan referring to your discussions and meetings with Mr. Huckaba subsequent to his furnishing of Exhibit A-11 on or about January 16th but prior to February 20, 1952, which is the date of Plaintiff's Exhibit No. 1—

Mr. Shapro: What is the question?

Q. (By Mr. Crosby): What if anything was discussed between yourself and Mr. Huckaba during those meetings?

Mr. Shapro: I object to that question, if your Honor please, on several grounds. The first ground

(Testimony of Earl R. McMillan.)

is it's too general, and secondly that if it is intended to elicit any discussions which led up to and were included in the contract of February 20th, that it would be an attempt by parol to vary the terms of a written instrument and those discussions would be merged in the instrument.

Mr. Crosby: I feel it is perfectly proper for me to—I should limit it, of course, to any discussions in connection with the purchase and sale of this equipment. I felt that was naturally [133] understood, but I would rephrase the question if your Honor so desires. I don't think the witness—

The Court: What have you to say about the other objection, the other part of the objection?

Mr. Crosby: All of these conversations, your Honor, go to proving our Affirmative Defenses 1, 2, 3 and 4.

The Court: What are 2 and 3?

Mr. Crosby: 2, your Honor—no, I'm sorry, I'll withdraw that as to 2, but as to—

The Court: 1 and 4?

Mr. Crosby: Yes. I will withdraw the question as to 2 and 3 and limit it to application to Affirmative Defenses 1 and 4.

The Court: As so limited the objection is overruled.

Q. (By Mr. Crosby): Would you like to have the question reread, Mr. McMillan?

A. Yes, please.

The Court: Read it, Mr. Reporter.

(Testimony of Earl R. McMillan.)

(The reporter read the last question as follows:

“Q. What if anything was discussed between yourself and Mr. Huckaba during those meetings?”) [134]

A. Those discussions covered every phase of the matter of the equipment that he was proposing to furnish and that I, as manager of the Bellingham Coal Mines Company, was trying to decide as being the right equipment for the job. We discussed many of the technical phases, Mr. Huckaba was a technical man and I am also a technical man, and we discussed all phases of the—the technical phases of the problem and the economics of the operation. We also discussed the setup of the Bellingham Coal Mines Company and how it was to be operated, the market for the coal; and as I say, we discussed many things during those several meetings and visits we had with each other.

Mr. Shapro: Your Honor, I move to strike the answer of the witness as not responsive to the question as limited.

The Court: The motion is granted. It is stricken.

The Witness: May I continue?

The Court: If you wish to find out anything else this witness said or that Mr. Huckaba said, you should ask him a question to that effect. This is direct examination.

Q. (By Mr. Crosby): Mr. McMillan, during these meetings after January 16, 1952, and prior

(Testimony of Earl R. McMillan.)

to February 20, 1952, [135] what discussions did you and Mr. Huckaba have relative to the furnishing of equipment to be placed in the Bellingham Coal Mine Company?

The Court: Other than what you have already stated, if you did have any other conversations. Do not repeat what you have already said.

A. Yes, sir. I did not mention, as I recall, that we agreed——

Mr. Shapro: That is a conclusion, your Honor, not a conversation.

The Court: You will have to say what he said and what you said. That statement that you were about to make indicates the necessity of your putting your answer in the form suggested by the Court. State what he said and what you said.

A. Your Honor, I cannot recall the exact words of what he said or what I said, because it involved many conversations.

The Court: If you can state the substance of what he said and what you said, that is acceptable, provided it is something that you haven't already testified to.

A. Yes, sir. The thing I have in mind to say is that Mr. Huckaba said that he didn't think that the size of the equipment specified under the [136] first proposal was sufficiently large or of high enough capacity to handle the tonnage of coal that we might want to handle in the operation of the Bellingham Coal Mines Company, in the operation of the Bellingham Coal Mine, and I agreed, and on

(Testimony of Earl R. McMillan.)

that basis we changed, or at my request, rather, Mr. Huckaba submitted a—you might call it an amended or another quotation.

Q. (By Mr. Crosby): Is that quotation Plaintiff's Exhibit No. 1?

Mr. Shapro: Your Honor, before that question is answered or ruled upon may I make a motion that the last answer of the witness to the preceding question be stricken upon the ground it is not responsive to the question with the limited purposes for which it was allowed?

The Court: Do you wish to respond?

Mr. Crosby: I think that it deals with the general subject of furnishing equipment for the Bellingham Coal Mines Company.

The Court: Wasn't that gone into previously in a general way?

Mr. Crosby: The previous testimony, your Honor, dealt with his conversations prior to January 16, 1952, when Exhibit A-11 was submitted. The present question runs to conversations after that time but [137] before the submission of Plaintiff's Exhibit No. 1.

Mr. Shapro: Your Honor, but you only limited that subject matter—

The Court: Just a minute. Did you so understand, Mr. McMillan? Did you understand that what you were last relating of conversations with him related to occurrences as of the time mentioned by Mr. Crosby?

A. Yes, sir.

(Testimony of Earl R. McMillan.)

Mr. Shapro: Our point, your Honor, is that it was offered and received solely for the purpose of showing the Affirmative Defenses 1 and 4, the question of no consideration and the question of the alleged suretyship. The subject matter of this witness' answer shows clearly that there was a change at his request in the quotation of February 16th, which is A-11, that changed it into the amended quotation which is the contract, Plaintiff's Exhibit No. 1. Therefore it doesn't show anything so far as we can see with respect to either consideration or suretyship.

The Court: The objection is overruled.

Mr. Crosby: May we have handed to the witness Plaintiff's Exhibit No. 2?

The Court: That will be done.

(The Bailiff did as requested.)

Q. (By Mr. Crosby): Subsequent to Plaintiff's Exhibit No. 1 [138] being given to Mr. Huckaba what if anything did you do in connection with Plaintiff's Exhibit No. 1?

Mr. Koch: May I have that question repeated?

The Court: Read it, Mr. Reporter. I again suggest that I would like for one Counsel to conduct the examination. Proceed.

(The reporter read the last question as follows:

("Q. Subsequent to Plaintiff's Exhibit No. 1 being given to Mr. Huckaba what if anything

(Testimony of Earl R. McMillan.)

did you do in connection with Plaintiff's Exhibit No. 1?")

A. I do not have Plaintiff's Exhibit No. 1.

The Court: Let him see it.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

Q. (By Mr. Crosby): Do you have in mind the question, Mr. McMillan?

A. Yes, sir. Well, on February 25th, which was five days after the date shown on Exhibit No. 1, I wrote a letter to Western Machinery Company, the Spokane Office, attention Mr. Huckaba, which is shown marked as Plaintiff's Exhibit No. 2.

Q. Subsequent to your writing the letter of February 25, [139] 1952, did you have any other personal contact with representatives of the Western Machinery Company? A. Yes, sir.

Q. When, if you recall, was the next time you had any contact with their representatives?

A. Well, I had frequent contacts with Mr. Huckaba during the period of installation of the equipment, which was sometime subsequent to February 20, 1952. It extended for several months, until the latter part of August of 1952. Also during that period there was—I had a contact with at least one other member of the Western Machinery Company that visited the mine at Bellingham. As I recall, his name was Mr. Seaton. And later, that is in the latter part of I'd say August, or during

(Testimony of Earl R. McMillan.)

August, the Western Machinery Company sent a man, a factory man, to supervise the installation, and his name was—if I remember correctly it was Moses.

Mr. Crosby: I would like to have marked for identification——

The Clerk: Defendant's Exhibit No. A-14.

(A letter dated August 20, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-14 for identification.)

Q. (By Mr. Crosby): Mr. McMillan, referring to what has [140] been marked for identification as Defendant's Exhibit No. A-14, would you please state what that is?

A. This is a letter dated August 29, 1952, I wrote and gave to Western Machinery Company at their request certifying on behalf of Bellingham Coal Mines Company as to the installation and performance of the equipment.

Q. You stated at their request. Do you recall what party made the request?

A. Mr. Moses, the man who as I mentioned was the factory representative on the job. At the conclusion of the trial runs he asked me specifically to give him this letter which he required or was required of him by his company.

Mr. Crosby: I would like to offer A-14 in evidence.

Mr. Shapro: No objection, your Honor.

(Testimony of Earl R. McMillan.)

The Court: Admitted.

(Defendant's Exhibit No. A-14 for identification was admitted in evidence.)

Mr. Crosby: May the witness please be handed Defendant's Exhibit No. A-5?

The Court: That will be done.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. McMillan, referring to the second paragraph of Defendant's A-5, would you first read the [141] first sentence of that Paragraph No. 2? A. Yes, sir.

Q. Would you please read it out loud?

A. Oh, pardon me. "Mr. McMillan advises us over the phone of your request that we give a conditional bill of sale on the remaining balance."

Q. Would you please state who of Western Machinery Company made that request and the time and how the request was made?

A. My recollection is that the man's name was Mr. Goering, G-o-e-r-i-n-g, as I recall, of the Western Machinery Company office in San Francisco telephoned me on or about July 30, 1952, and asked me if I thought that the Bellingham Coal Mines Company would be willing to give Western Machinery a conditional bill of sale on the purchase of this equipment, and my reply was that I could not answer the question but that I would refer it to Mr. Ramage, the President of Bellingham Coal Mines Company. His office is in Spokane, inciden-

(Testimony of Earl R. McMillan.)

tally, but I told Mr. Goering I would refer the matter to Mr. Ramage by telephone and he no doubt would hear directly from Mr. Ramage.

Mr. Crosby: May the witness be handed Exhibits A-6 and A-9?

The Court: That will be done. [142]

(The bailiff did as requested.)

Mr. Crosby: For the record may I ascertain if those two have been admitted in evidence as yet?

The Court: They have not been admitted.

Mr. Crosby: Pardon?

The Court: They have not been admitted.

Mr. Crosby: Might I inquire if A-5 has been admitted in evidence?

The Court: It has.

Mr. Shapro: Yes, it has.

Q. (By Mr. Crosby): Mr. McMillan, subsequent to your telephone conversation with Mr. Goering did you receive any communications or have any meetings or conversations with representatives of Western Machinery Company relative to the equipment which was furnished the Bellingham Coal Mines Company? A. Yes, sir.

Q. When was that? What were they, first, meetings or—— A. Telephone calls.

Q. From whom?

A. Mr. Goering in San Francisco.

Q. In what connection?

A. In connection with the possibility of getting

(Testimony of Earl R. McMillan.)

payment from the Bellingham Coal Mines Company on their account.

Q. Did you have any further conversations with their [143] representatives?

A. Well, the telephone call to which I last referred was on or about August 10th, about ten days after the previous call regarding the possibility of getting a conditional bill of sale, and in this telephone conversation of August 10th or thereabouts I assured Mr. Goering that Bellingham Coal Mines Company was making every effort to arrange for a substantial payment on the account and that I could assure him that he would receive a payment within the next few days. I couldn't say how much. He pressed me for an estimate of the amount and I estimated anywhere from \$15,000 to \$25,000 to the best of my knowledge, and I told him at the conclusion of the conversation that I would again telephone Mr. Ramage, the President of the company, in Spokane and inform him of my conversation that day with him, Mr. Goering, and would follow through on it.

Q. Subsequent to that time did you have any meetings with anyone connected with Western Machinery Company?

A. Well, subsequent to that time, yes, my meeting with Mr. Moses in Bellingham.

Q. Well, aside from those that you have already referred to, Mr. McMillan.

A. Aside from those I have referred to I had no

(Testimony of Earl R. McMillan.)

meetings that I recall until the latter part of February or [144] early March of 1953.

Q. And what meeting was that and where was it?

A. That meeting was in San Francisco in Mr. Barshell's office.

Q. What was the subject of that meeting?

A. I called at the office of the Western Machinery Company in San Francisco at the request of the Bellingham Coal Mines Company to inform them as to the condition of the Bellingham Coal Mines Company and the progress we were making in trying to solve the financial difficulties which the company was heading into about that time.

Q. What if anything did Mr. Barshell say at that meeting in connection with the payment by Bellingham Coal Mine Company?

A. I'm sorry, I didn't hear the first part. Would you read it back to me?

(The reporter read the last question.)

A. Well, the substance of his comment was that they were, that is the Western Machinery Company was becoming very much concerned about the account, and while we were discussing the subject, as I recall, Mr. Shapro came in. I don't know whether he just happened to drop in or whether Mr. Barshell—

Q. The question, Mr. McMillan, dealt only with Mr. Barshell's statements. [145]

A. Beg pardon?

(Testimony of Earl R. McMillan.)

Q. The question dealt only with Mr. Barshell's statements.

A. Well, I repeated to Mr. Barshell what I had told—excuse me, strike that. I repeated to Mr. Shapro what I had said to Mr. Barshell.

The Court: He tried to let you know that he was not interested in that at this moment. He is only interested in what Mr. Barshell said, if anything.

Q. (By Mr. Crosby): Now, what was the nature of the account that Bellingham Coal Mine Company had with Western Machinery Company?

Mr. Shapro: I object to that question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: That objection is sustained. Again I remind Counsel that it would be proper to ask the witness to state what was said or the substance of what was said by the person who was supposed to be speaking, if he has not already done that.

Q. (By Mr. Crosby): Mr. McMillan, did the Bellingham Coal Mine Company give Western Machinery Company anything in writing evidencing the indebtedness for the machinery which was furnished to the Bellingham Coal Mine Company and installed at Bellingham, Washington?

Mr. Shapro: To which question we object, [146] if your Honor please, upon the ground that it is incompetent, irrelevant and immaterial and no foundation is laid, and it is no part of any af-

(Testimony of Earl R. McMillan.)

firmative defense here in connection with this case. There is no action brought upon any instrument in writing in connection with a payment other than a contract and agreement which is Plaintiff's Exhibits 1 and 2.

Mr. Crosby: Your Honor, one of the affirmative defenses is No. 4, that—No. 3, that the Western Machinery Company took a promissory note from Bellingham Coal Mines Company, and that the promissory note resulted in a novation.

Mr. Shapro: May I be heard on that subject, your Honor?

The Court: Yes, you may.

Mr. Shapro: Your Honor, it is true that Counsel has pleaded an alleged novation by the taking of a promissory note by the plaintiff from the Bellingham Coal Mines Company. However, and the purpose of this objection, the foundation of it, your Honor, is that in order to show a novation a foundation must be laid of several things to constitute a novation, no one of which has been elicited from this or any other witness; namely, among other things an agreement to make a novation, an intention of the parties to make [147] a novation and the identity of the parties to make a novation, and fourth, the consideration for a novation. None of those elements have been elicited from this or any other witness, and it is our position that prior to the receipt by this Court of any evidence on the subject of the note the basis or foundation for a novation such as the agreement, the consideration

(Testimony of Earl R. McMillan.)

and the intention of the parties must first be established.

The Court: You can't establish them all at once.

Mr. Crobsy: That's right, your Honor, it has to be done by steps.

The Court: The objection is overruled. What I would like to know is what do you call No. 1. What do you. It isn't what the Court understands. What I would like to know is what do you, Mr. Crosby, call the first affirmative defense. Will you mark the page and the line where it begins and where it ends? I am unable to discover any numbering and I have to number something here. On what page does the first affirmative defense begin? What is your contention?

Mr. Crobsy: Page No. 1 on Line 26.

The Court: Is that the first affirmative [148] defense?

Mr. Crosby: Our first affirmative defense to the first count, of the amended answer, your Honor.

The Court: Then where does the second affirmative defense start?

Mr. Crosby: The second affirmative defense starts on Line 3 of Page 2, your Honor. It is my understanding that I had used lined paper. I——

The Court: You have. That is the second affirmative defense, is it?

Mr. Crosby: The second affirmative defense, yes, your Honor.

The Court: I am working "2" in the margin opposite that Line 3. I have marked "1" with a

(Testimony of Earl R. McMillan.)

lead pencil in the margin of your amended answer filed April 12, 1956.

Mr. Crosby: Yes, your Honor.

The Court: I have put a figure 1 in the margin on the left-hand side of the page opposite Line 26 on the first sheet. Where does No. 3 begin?

Mr. Crosby: No. 3 starts with Line 10 on Page 2, your Honor.

The Court: That is No. 3, is it?

Mr. Crosby: That is No. 3.

The Court: I am marking that "No. 3."

Mr. Crosby: No. 4, your Honor—— [149]

The Court: Where does that start?

Mr. Crosby: That starts with Line 19 on Page 2.

The Court: In other words, it is paragraph numbered four on that page?

Mr. Crosby: It is Paragraph No. 4, yes, sir.

The Court: That is No. 4 affirmative defense, is it?

Mr. Crosby: Yes, your Honor. Of course, I was referring only to the first count.

The Court: I don't care what you were referring to respecting counts. You have referred in the record here today to an offer of proof with respect to Affirmative Defenses 1 and 4. I am trying to identify them.

Mr. Crosby: Yes, your Honor.

The Court: Are the affirmative defenses that you made an offer to with respect to certain exhibits these 1 and 4 that you have just now mentioned?

Mr. Crosby: Then going further to Page 3——

(Testimony of Earl R. McMillan.)

The Court: For what, which number on Page 3?

Mr. Crosby: I'm sorry, your Honor. Possibly I didn't make it——

The Court: You certainly haven't for me, and I don't know how you could if you claim that 1 and 4 [150] are stated in part at some other places other than these.

Mr. Crosby: Your Honor, plaintiff has two counts, and the same——

The Court: Do they assert the same affirmative defense on each count?

Mr. Crosby: That is right, your Honor.

The Court: All right. Where does Count 2 begin and where does the Affirmative Defense No. 1 begin as to the Count 2?

Mr. Crosby: On Page 3, Line 12.

The Court: On Page 3, Line what?

Mr. Crosby: 12, numbered Paragraph 1.

The Court: Page 3, Line 12?

Mr. Crosby: 12, yes, your Honor.

The Court: What if anything do the words beginning on Line 27 near the bottom of Page 2 down to and including the line which you last mentioned, Line 12 on Page 3, concern, if they concern anything? Do they constitute another affirmative defense or do they constitute anything in the way of an answer?

Mr. Crosby: They are an answer to plaintiff's second count.

The Court: Just of denial, is that what it amounts to? [151]

(Testimony of Earl R. McMillan.)

Mr. Crosby: That is right, your Honor.

The Court: The first affirmative defense, which is the same kind of a defense, is it, as to Count 2 which the corresponding number was to Count 1, is that right?

Mr. Crosby: That's right, your Honor.

The Court: And that is Line what?

Mr. Crosby: Line 12 on Page 3.

The Court: I am marking a "1" in the margin opposite Line 12. Where is the second affirmative defense?

Mr. Crosby: Line 19 on Page 3.

The Court: Very well, that will be marked "2" opposite the 19th line on Page 3. Where is the third affirmative defense?

Mr. Crosby: Line 26 on Page 3.

The Court: That will be marked with the figure 3 opposite Line 26. Where is No. 4?

Mr. Crosby: Line 4 on Page 4.

The Court: All right. At the top of that Page 4 above Line 1 in the margin I am putting "Affirmative Defenses," those two words, and then this "4" down below will appear under that, and on Page 3 above Lines 9 and 10 I am putting the words "Affirmative Defenses" in the left-hand margin above the figure 1 [152] and at or about Lines 9 and 10. And then at or about Line 23 I am putting the words "Affirmative Defenses," that is on Page 1. Then on Page 2 at the top of the left-hand margin above the line numbered 1 I am putting the words "Affirmative Defenses." Now at

(Testimony of Earl R. McMillan.)

least I can understand that. I don't suppose anyone else can, but I can. I certainly did not understand the situation before that was done. There are two counts and you have the same set of affirmative defenses stated as to each, is that right?

Mr. Crosby: That is right, your Honor.

The Court: As to which one of these counts do you wish the exhibits which have been admitted for a limited purpose as to Counts 1 and 4 to be applicable?

Mr. Crosby: The affirmative defenses to both counts, your Honor.

The Court: In other words, Affirmative Defenses numbered 1 and 4 in respect to the affirmative defenses of both counts, you wish those admitted, and the Court will let the record at this time show that that is the intention of the Court.

Mr. Crosby: Thank you very much, your Honor.

The Court: You may proceed by further interrogation of this witness. If you have a question before him, restate it. [153]

Q. (By Mr. Crosby): Mr. McMillan, did the Bellingham Coal Mine Company give to Western Machinery Company any written agreement covering the indebtedness for the equipment which was installed in the Bellingham coal mine?

The Court: Answer yes or no.

Mr. Shapro: I'm going to object to that question, if your Honor please, on the ground it calls for the opinion and conclusion of the witness.

(Testimony of Earl R. McMillan.)

The Court: The objection is overruled. Answer yes or no.

A. Yes.

Q. (By Mr. Crosby): Referring to Defendant's Exhibit No. A-6, would you please state what that A-6 is?

The Court: For identification. It has not been admitted.

Mr. Crosby: Yes.

A. It is a promissory note dated August 20, 1952, in the amount of \$56,038.17.

The Court: That is a part of the contents. It is not in evidence yet.

Q. (By Mr. Crosby): What signatures appear on the note? On that exhibit, pardon me.

A. James S. Ramage, President, Bellingham Coal Mines Company, and Herbert Little, Secretary, Bellingham [154] Coal Mines Company.

Q. Are you personally familiar with the signatures of Mr. Ramage and Mr. Little?

A. Yes, sir.

Q. Please state if their signatures appear on that Exhibit A-6?

A. Yes, sir.

Q. What is the nature of A-6?

A. It is a promissory note dated August 20, 1952.

The Court: That is sufficient.

Q. (By Mr. Crosby): That is sufficient. Who are the parties on the note?

A. The note is payable to the Western Machinery Company.

Q. Now, did you ever have any discussions with

(Testimony of Earl R. McMillan.)

representatives of Western Machinery Company relative to the note which is Defendant's A-6?

Mr. Shapro: I object to that question, if your Honor please, upon the ground no proper foundation has been laid. The note is not in evidence.

The Court: The objection is overruled. Answer yes or no.

The Witness: Would you read the question, please?

(The reporter read the last question.)

A. No, sir. [155]

The Court: At this point I would like to inquire how much more time Counsel on both sides expect it will take to finish the trial so far as taking testimony is concerned.

Mr. Crosby: I believe that the balance of the defendant's case, the testimony will take about a half a day.

The Court: Will there be any rebuttal?

Mr. Shapro: Yes, there will be rebuttal, and if the balance of defendant's case takes a half a day our rebuttal will not take over a half a day.

The Court: We only have one other day this week. I assume Counsel will wish to argue the case.

Mr. Shapro: Yes, your Honor.

The Court: And we will expect to finish it by about this time. So that means that we will have to begin early in the morning. We will continue for a little while longer now. I wish Mr. Crosby could

(Testimony of Earl R. McMillan.)

speed up his examination, especially relating to exhibits. You may proceed.

Q. (By Mr. Crosby): Mr. McMillan, did the Western Machinery Company ever make any demand upon the Northwestern Improvement Company to give a promissory note covering the indebtedness for the machinery placed with the Bellingham Coal Mine Company? [156]

Mr. Shapro: I object to that, if your Honor please, on the ground the question is leading and suggestive.

The Court: The objection is overruled.

A. No, sir.

Mr. Shapro: Your Honor, I don't want to delay, but I would like to have that question read.

The Court: Read the question.

Mr. Shapro: Please, your Honor.

(The reporter read the last question as follows:

“Q. Mr. McMillan, did the Western Machinery Company ever make any demand upon the Northwestern Improvement Company to give a promissory note covering the indebtedness for the machinery placed with the Bellingham Coal Mine Company?”)

The Court: You may proceed.

Q. (By Mr. Crosby): Relative to your conversations with Mr. Barshell in San Francisco prior to the time Mr. Shapro came into the office, was

(Testimony of Earl R. McMillan.)

there any discussion with Mr. Barshell relative to——

The Court: Why don't you ask him what [157] if anything was said and get him to say everything that was said and done and then let it go at that?

Q. (By Mr. Crosby): What, if anything, was said in connection with Defendant's Exhibit A-6?

Mr. Shapro: I object to the form of the question, if your Honor please, upon the ground it is leading and suggestive.

The Court: The objection is overruled.

A. Mr. Shapro said to me——

Q. (By Mr. Crosby): Mr. McMillan, before Mr. Shapro came in. A. Pardon me?

Q. What did Mr. Barshell say?

The Court: If anything he did say in addition to what you have already testified to earlier.

A. Nothing further.

Q. (By Mr. Crosby): Now, at that same time was there anybody else in Mr. Barshell's office with whom you discussed the payment for the machinery which was installed in the Bellingham Coal Mine Company? A. Mr. Shapro came in.

Q. Yes, and what, if anything, did Mr. Shapro say at that time?

The Court: You should first find out who was present and when it was as nearly as he can [158] fix it.

Mr. Crosby: Thank you, your Honor.

Q. (By Mr. Crosby): Who was present, Mr. McMillan, at that meeting?

(Testimony of Earl R. McMillan.)

A. Mr. Barshell and Mr. Shapro.

Q. And——

The Court: Who else, if anyone?

A. No one else.

The Court: Were you present?

A. I was, sir.

The Court: Very well. When was it approximately with reference to the other conversation you last were asked about?

A. Your Honor, I had only one conversation.

The Court: What day was it, then, if you remember, or month?

A. Approximately—it was some time during the first week in March, 1953.

Q. (By Mr. Crosby): Just yourself and Mr. Barshell and Mr. Shapro were present?

A. That's correct.

Q. What, if anything, did Mr. Shapro say relative to——

The Court: Strike the "relative." And what did you say, if anything, regarding any subject there at that time?

A. Briefly and in substance Mr. Shapro said, "We think [159] the Northwestern Improvement Company has some liability on this account." My reply was I personally did not think there was but I was not a lawyer or I did not care to go into any legal discussion of the matter, and Mr. Shapro graciously agreed to that, that he wouldn't question me any further about it or discuss the matter further.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Crosby): After the giving of the promissory note by Bellingham Coal Mine Company, after that time and before Mr. Shapro's statement that you just referred to, did anybody of the Western Machinery Company make any contention to Northwestern Improvement Company that they were responsible for the equipment that was delivered to the Bellingham Coal Mine?

A. Not to my knowledge.

The Court: I think we will stop here. Court is adjourned until tomorrow morning at 10:00 o'clock.

(Thereupon, at 4:15 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Friday, June 15, 1956.) [160]

Friday, June 15, 1956—10:00 o'Clock A.M.

(All parties present as before.)

The Court: You may proceed in the case on trial.

Mr. Crosby: Mr. McMillan, please resume the stand.

The Court: Mr. McMillan will resume the stand for further interrogation.

EARL R. McMILLAN

resumed the stand.

Mr. Crosby: I have three documents which I would like to have marked.

The Clerk: Defendant's Exhibits A-15, A-16 and A-17.

(Testimony of Earl R. McMillan.)

The Court: In two instances I believe there is more than one paper suggested as an exhibit and I wish to know first before approving the marking of them all as one exhibit in any situation that Counsel are agreed that if one of the component papers is admissible, all are, and that as to none of such component papers is the matter of admissibility affected by different facts to the objection of defendant.

Mr. Crosby: Your Honor, I discussed that with Mr. Shapro and it is agreeable with him that [161] they be marked.

The Court: Then the clerk will mark them as requested by Counsel.

(Voucher No. 1060, dated Nov. 10, 1953, of Western Machinery Co., was marked Defendant's Exhibit No. A-15 for identification.)

(A uniform straight bill of lading, dated 5/20/52, and packing list of Western Machinery Company were marked Defendant's Exhibit No. A-16 for identification.)

(Bills of lading and packing lists of Allis-Chalmers Manufacturing Co. and a bill of lading of Cutler-Hammer, Inc., and packing list, were marked Defendant's Exhibit No. A-17 for identification.)

Q. (By Mr. Crosby): Mr. McMillan, would you please refer to Defendant's exhibit that is marked for identification as A-15 and explain what that is?

(Testimony of Earl R. McMillan.)

A. This is a voucher showing the payment by check of the Bellingham Coal Mines Company to Western Machinery Company, under date of November 10, 1953.

The Court: Is it or is it not what was formerly known as a check stub which the drawer of the check usually kept in his office or files?

Mr. Crosby: Your Honor, to expedite matters, I believe that—— [162]

Mr. Shapro: I will so stipulate, your Honor.

The Court: I asked the witness.

Mr. Shapro: Sorry.

The Court: You say it is stipulated that that is what it is?

Mr. Shapro: That's what it is, yes, your Honor.

Mr. Crosby: Yes, your Honor.

The Court: Very well.

Mr. Crosby: Could the witness please be handed Defendant's A-4, which is a group of checks?

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. McMillan, would you please refer to Check No. 1017 in Defendant's A-4 and would you please tell the Court whether or not the check stub is the check stub for the Check No. 1017? A. Yes, sir.

The Court: Does 1017 have a clerk's identifying mark? If so, will you let it be referred to by that mark?

Mr. Crosby: The group of checks, your Honor, is marked——

(Testimony of Earl R. McMillan.)

The Court: No, you referred to Defendant's A-4 a minute ago and asked him to look at that.

Mr. Crosby: Yes, your Honor. [163]

The Court: And now you have referred to something as a check.

Mr. Crosby: The exhibit is a group of checks.

The Court: What exhibit are you talking about now?

Mr. Crosby: Defendant's Exhibit A-4, your Honor, is a—

The Court: Those are paid checks, apparently.

Mr. Crosby: Paid checks.

The Court: All right, and you asked him to look at one of them?

Mr. Crosby: At one of them.

The Court: You should refer to one of them as the exhibit by number, Defendant's Exhibit A-4, Mr. Crosby, so that the record identification of the thing you are talking about will be shown in your question.

Mr. Crosby: I'm sorry, I will restate the question.

The Court: In order for you to be able to tell in the future, if you ever want to look at the record again, what you are talking about and so that any other person might be able to tell it. That is the reason for a suggestion of this sort. Proceed.

Q. (By Mr. Crosby): Mr. McMillan, in Defendant's Exhibit [164] No. A-4 would you please refer to the check in that exhibit designated Check

(Testimony of Earl R. McMillan.)

No. 1017 and tell the Court whether or not that check was the same check issued in connection with the stub which is marked as Exhibit A-15?

A. That is correct.

Mr. Crosby: Might Exhibit A-15 be admitted into evidence, your Honor?

Mr. Shapro: Your Honor, I have no objection to the introduction in evidence of A-15 provided it is understood, and Counsel has indicated he would so stipulate, that the data on the stub was not endorsed upon or shown upon the face of the check itself when it was transmitted to plaintiff.

Mr. Crosby: I will so stipulate.

The Court: Defendant's Exhibit A-15 is now admitted.

(Defendant's Exhibit No. A-15 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Referring to Defendant's Exhibits A-16 and A-17, Mr. McMillan, would you please explain what those exhibits are?

A. A-16 is a railroad bill of lading and a packing list covering—

The Court: The last, and what? [165]

A. A packing list, covering partial shipment of coal washing plant by Western Machinery Company to Bellingham Coal Mines Company at Bellingham.

Q. (By Mr. Crosby): And A-17 is a similar bill of lading, Mr. McMillan?

Mr. Shapro: Your Honor, I'm going to object to Counsel's leading the witness. On that there is a difference.

(Testimony of Earl R. McMillan.)

The Court: Objection sustained.

Mr. Crosby: I'm sorry, I thought we were agreed.

The Court: It would be so easy for one of the experience of Mr. Crosby to ask a question that is unobjectionable in a situation like this. You may proceed.

Mr. Crosby: I'm sorry, I misunderstood.

The Court: Proceed.

A. A-17—

Q. (By Mr. Crosby): Would you please explain what A-17 is, Mr. McMillan?

A. Defendant's Exhibit A-17 is a railroad bill of lading covering a partial shipment of a coal washing plant from Allis-Chalmers Manufacturing Company's plant in Norwood, Ohio, to Western Machinery Company and Bellingham Coal Company at Bellingham, Washington. [166] Also a packing list describing contents of shipment. Also another bill of lading covering partial shipment of coal washing plant from Allis-Chalmers' plant in Cleveland, Ohio, consigned to Western Machinery Company and Bellingham Coal Mines Company at Bellingham, Washington, together with packing list describing contents of shipment. Also bill of lading covering partial shipment of coal washing plant from Cutler-Hammer, Inc., of San Francisco, California, to Bellingham Coal Mines Company, together with packing list describing contents of shipment.

(Testimony of Earl R. McMillan.)

The Court: Hammer-Cutler, is that what you said?

A. Cutler-Hammer, Inc., San Francisco.

The Court: You may proceed.

Q. (By Mr. Crosby): As to all of the packing lists in Exhibit No. A-17, what equipment do those lists cover, Mr. McMillan?

Mr. Shapro: I will stipulate, Counsel, that they cover a part of the coal washing plant involved in this case.

Mr. Crosby: Thank you, Counsel. May the witness please be handed Exhibit No. 1. Your Honor, may Exhibits—

The Court: Is it Plaintiff's 1, Mr. Crosby? [167]

Mr. Crosby: Plaintiff's 1, your Honor.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

Mr. Crosby: Your Honor, may Defendant's Exhibits A-15, A-16 and A-17 be admitted in evidence?

Mr. Shapro: I think A-15 is already in, your Honor.

The Court: That is true.

Mr. Shapro: So far as Exhibits A-16 and A-17 are concerned, your Honor, we object to their admission in evidence upon several grounds. With respect to Exhibit A-16, which in substance is a bill of lading of a partial shipment of a part of this coal washing plant by Western Machinery Company of San Francisco addressed and consigned to Bellingham Coal Mines Company, we submit that it is

(Testimony of Earl R. McMillan.)

incompetent, irrelevant and immaterial because it does not tend to prove or disprove any issue in this case, having in mind, your Honor, that Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2, namely the so-called what we call the contract here, the order, directs us, the defendant being the buyer, directs us to ship and deliver the equipment in question to Bellingham Coal Mines Company. Therefore, we submit that a bill of lading from us of part of the shipment directed to Bellingham Coal Mines Company will have no [168] bearing or materiality upon the issue in this case as to whether or not Northwestern Improvement Company is liable. Exhibit A-17—

The Court: Speak what the evidence indicates in your mind was the origin and so forth of that exhibit.

Mr. Shapro: A-17, your Honor?

The Court: According to the evidence before the Court.

Mr. Shapro: Yes. According to the evidence so far as Exhibit A-17 is concerned, it represents three shipments which I concede, have conceded, includes a part of the coal washing plant involved which we sold, so we claim, to the defendant.

The Court: Are the shipments mentioned as the two from the Ohio plants, two different plants, the Allis-Chalmers and one from Cutler-Hammer?

Mr. Shapro: Yes, your Honor.

The Court: That is A-17, is it?

Mr. Shapro: That is A-17, yes, your Honor. That

(Testimony of Earl R. McMillan.)

consists of two bills of lading, one from Allis-Chalmers and one from Cutler-Hammer. We make the further objection as to Exhibit A-17 that it is hearsay as to us and no proper foundation has been laid in that we cannot be bound without some foundation by the directions given to the carrier as to the named [169] consignee without first showing that it was ordered by us that way, and also, your Honor, the two of the three bills of lading, namely the first two from Allis-Chalmers, are actually consigned to Western Machinery Company and Bellingham Coal Mines Company, and therefore we submit their admission in evidence would not tend to prove or disprove any issue in this case, because a joint consignment to the seller passes no title or conveys no information.

The Court: I would like to know what you claim the evidence shows with respect to the difference, as to paper, between Defendant's Exhibit A-16 and Defendant's Exhibit A-17.

Mr. Shapro: Is your Honor addressing the question to me, sir?

The Court: Yes, I am.

Mr. Shapro: The difference, your Honor, is that A-16 is a direct shipment by us; we are the consignor. The other three we are not the consigner, either Allis-Chalmers or Cutler-Hammer are the consignors. In other words, your Honor, one is definitely chargeable to us if it is material. The other three we submit, even if material, would not be

(Testimony of Earl R. McMillan.)

chargeable to us and would be objectionable as hearsay.

The Court: I understand that among other [170] things the purpose of the offer is to show some of the allegedly material conduct of the parties subsequent to the date and execution of the contract. It isn't easy for the Court to see how that would be objectionable on the ground of hearsay, since it is papers handled by one or the other of the two parties, and if not by both of them after the execution of the contract and relate to other mentioned acts, acts which are mentioned in the documents themselves, such as actions effectuating the shipments.

Mr. Shapro: I agree with your Honor's observations there with the single exception, if I may say so, your Honor, that the direction in the bills of lading of consignment to Bellingham Coal Mines Company are consistent with the order, they are not inconsistent with the order.

The Court: That is not for the Court to decide as to admissibility, I believe. That is more a matter of probative effect. The objections are overruled. Defendant's Exhibit A-16 is admitted. Defendant's Exhibit A-17 is admitted.

(Defendant's Exhibits Nos. A-16 and A-17 for identification were admitted in evidence.)

The Court: I would like for Mr. Crosby to [171] say what is Defendant's Exhibit A-16, giving it a one word name or two word name, if you can, reflecting the nature of its contents, and then I would

(Testimony of Earl R. McMillan.)

like to ask you the same question with respect to A-17, according to what the evidence shows. I would like to have a clear-cut idea in the way of a name for each, to be able in the future to help me distinguish between the two, if you know of any information like that that reflects the statement of this witness.

Mr. Crosby: Your Honor, A-16 is Western Machinery Company's bill of lading.

The Court: Did the witness say or did he not say it was a railroad bill of lading and packing list concerning this machinery shipment?

Mr. Crosby: Yes, your Honor.

The Court: All right. Now, what did the witness say as to what the things were in Defendant's Exhibit A-17, if he said anything different from what he said about what constituted A-16?

Mr. Crosby: Your Honor, they are the same. The only difference is that the bills of lading were——

The Court: Bills of lading—do you mean A-16? Please refer to the exhibit number.

Mr. Crosby: A-16, your Honor, is a bill of lading and packing list covering a portion of the [172] equipment forwarded to Bellingham Coal Mines Company. However, the bill of lading is Western Machinery Company's bill of lading. A——

The Court: Were your last remarks about A-16?

Mr. Crosby: A-16, your Honor.

The Court: Very well.

(Testimony of Earl R. McMillan.)

Mr. Crosby: As to A-17, your Honor, it is three bills of lading together with packing lists.

The Court: In other words, A-17 comprises bills of lading also as well as A-16, is that right?

Mr. Crosby: That is right, your Honor.

The Court: Very well, that is all I want to know. Proceed.

Q. (By Mr. Crosby): Mr. McMillan, please refer to Plaintiff's Exhibit No. 1. Would you please explain the reason for the change of name at the head of the quotation?

The Court: Will you read that question, Mr. Reporter?

(The reporter read the last question.)

Q. (By Mr. Crosby): At the top of the quotation, Mr. McMillan. A. I understand, yes.

The Court: If he knows.

Q. (By Mr. Crosby): If you know, Mr. McMillan. [173] A. Yes, sir, I know.

Q. Under what circumstances was the change made, if you know, Mr. McMillan?

A. Well, at the time this order was placed with Mr. Huckaba of Western Machinery Company, Mr. Huckaba stated to me in substance that because of the fact that Bellingham Coal Mines Company—

The Court: He has already said that before, "that because."

Mr. Shapro: I don't think so, your Honor.

The Court: Pardon?

(Testimony of Earl R. McMillan.)

Mr. Shapro: With due respect, I don't think he has, your Honor. I'm sorry.

The Court: Proceed.

A. —because of the fact that the Bellingham Coal Mines Company was a newly organized company and unknown to Western Machinery Company, that it would therefore probably result, that is it would probably mean that his company office in San Francisco would raise some question as to the credit ability of the Bellingham Coal Mines Company and that it would expedite processing of the order and delivery of the equipment if the name of Northwestern Improvement Company were substituted in place of Bellingham Coal Mines Company on the order and inasmuch as time was the essence of the matter at [174] that time, getting the equipment ordered and delivered, I agreed to comply with his request with the understanding very definitely that this equipment was being purchased for the Bellingham Coal Mines Company and that the Bellingham Coal Mines Company would pay for it.

Mr. Shapro: Your Honor, at this time may I move to strike the words and everything that follows "with the understanding that" upon the grounds that it is the conclusion of the witness and also that it is an attempt by parol to vary the terms of a written instrument.

The Court: I understood he was saying what was said. If he did not state it that way, the Court's ruling will be one way, but if he said it another way—Mr. McMillan, do not state in your own mind any

(Testimony of Earl R. McMillan.)

reasons that you had or that he had in his mind unless you thereby state the words used by him or you.

The Witness: I understand, your Honor.

The Court: Were you undertaking to speak his words or your words stated in his presence, one or the other?

The Witness: Yes, sir. I'm expressing the words as I can recall them which are in substance as I stated at the beginning the exact words exchanged between Mr. Huckaba and myself at that time. [175]

The Court: The objection is overruled.

Q. (By Mr. Crosby): Mr. McMillan, were the terms of payment discussed between yourself and Mr. Huckaba?

Mr. Shapro: At any time, or——

Q. (By Mr. Crosby): At any time.

A. No, sir.

Q. Mr. McMillan, state whether or not under any agreement with the Bellingham Coal Mines Company the Northwestern Improvement Company was to or did derive any monetary gain from the purchase of the coal washing plant from the Western Machinery Company.

Mr. Shapro: I object to the question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

(Testimony of Earl R. McMillan.)

Mr. Shapro: Your Honor, that is one of the very issues in this case.

Mr. Crosby: I submit, your Honor, that this man stated on direct examination that he had advised Mr. Huckaba in their preliminary negotiations that the Northwestern Improvement Company was the manager of the coal mine of the Bellingham Coal Mines Company on a fixed fee basis, and this question tends to bring out what if any profit the Northwestern Improvement [176] Company might have derived or was anticipating deriving from the purchase of this equipment.

Mr. Shapro: If that is also the purpose of the question I will object upon the additional ground that it is cross-examination of Counsel's own witness.

The Court: I would like to hear the question read again, Mr. Reporter.

(The reporter reread the question as follows:

“Q. Mr. McMillan, state whether or not under any agreement with the Bellingham Coal Mines Company the Northwestern Improvement Company was to or did derive any monetary gain from the purchase of the coal washing plant from the Western Machinery Company.”)

The Court: I think I understand the objections and the question. The objections are overruled.

Q. (By Mr. Crosby): Would you please answer the question, Mr. McMillan? A. No, sir.

(Testimony of Earl R. McMillan.)

Q. Mr. McMillan, what is the present status of the Bellingham Coal Mines Company? [177]

A. It has been liquidated through receivership and bankruptcy proceedings.

Q. Approximately when did Bellingham Coal Mines Company go into bankruptcy?

A. Sometime during July, 1955.

Mr. Shapro: May 2nd, Counsel.

Mr. Crosby: Do you want to stipulate to that?

Mr. Shapro: Your Honor, so that there may be no confusion in the record, the bankruptcy of Bellingham Coal Mines, its petition was filed in this court as a matter of fact on May 2, 1955.

Mr. Crosby: I will so stipulate.

The Court: May 2, 1955?

Mr. Shapro: May 2, 1955, yes, your Honor.

Mr. Crosby: I have no further questions of this witness, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Shapro:

Q. Mr. McMillan, how long have you been employed by Northwestern Improvement Company, approximately?

A. A little over twenty-six years.

Q. And how long have you been or occupied the position [178] of manager of Northwestern Improvement Company's coal operations?

A. Since April, 1951.

Q. In connection with the coal operations of

(Testimony of Earl R. McMillan.)

Northwestern Improvement Company in this state who is the executive officer?

A. We have no executive officer in the State of Washington.

Q. In other words, you, Mr. McMillan, as the manager of its coal operations are the highest official of Northwestern Improvement Company in the State of Washington? In connection with coal operations I'm referring to.

A. At this time, yes, sir.

Q. Was that true in 1952?

A. I think that is correct.

Q. Now, you have testified on direct examination that the Northwestern Improvement Company was operating the coal mine for Bellingham Coal Mines Company, is that right?

A. Yes, sir.

Q. And that they did that on an arrangement for cost plus a fixed fee, is that right?

A. Yes, sir.

Q. As a matter of fact the cost represented all of the out of pocket expense connected with the maintenance and the operation and the control of the mining properties [179] of Bellingham Coal Mines Company, is that right?

A. I think that is correct as far as I know.

Q. And the fixed fee was twenty per cent of that figure to be added, is that right?

A. That's correct.

Q. And I think you testified——

Mr. Crosby: Pardon me. Might I have the question before that read back?

(Testimony of Earl R. McMillan.)

The Court: That will be done.

(The reporter read the question back as follows:

“Q. As a matter of fact the cost represented all of the out of pocket expense connected with the maintenance and the operation and the control of the mining properties of Bellingham Coal Mines Company, is that right?”)

Mr. Crosby: Your Honor, I realize the question is passed but I would like to have the question and answer stricken as the question is indefinite in that it doesn't explain whose out of pocket costs.

The Court: The objection and request are overruled and denied.

Q. (By Mr. Shapro): And I think you testified, Mr. McMillan, [180] that there was an office of the Bellingham Coal Mines Company maintained on the 10th floor of the Smith Tower here in Seattle, is that right? A. That's right, sir.

Q. And that that was also the office of Northwestern Improvement Company?

A. Yes, sir.

Q. Did the Bellingham Coal Mines Company during the time that any part of its office was maintained in the Northwestern Improvement Company office in the Smith Tower pay any portion of the rent of that office?

The Witness: Would you read the question, please, back to me.

(Testimony of Earl R. McMillan.)

(The reporter read the last question.)

A. Not to my knowledge.

Q. (By Mr. Shapro): As a matter of fact the executive office of Bellingham Coal Mines Company was maintained through Mr. Ramage in Spokane, was it not?

A. Well, Mr. Ramage was the President of the company and his office was in Spokane.

Q. Was there any office as such at the mine at Bellingham?

A. I'm sorry, I don't understand what you mean by "as such."

Q. As such, meaning a place where books and records are kept and correspondence pertaining to office management is conducted. [181]

A. Yes, sir.

Q. There was such an office there?

A. Yes, sir.

Q. Did you use that from time to time?

A. Yes, sir.

Q. Now, Mr. McMillan, the operations of the coal mine at Bellingham of the Bellingham Coal Mines Company from I think you said January 1st, 1952, on were under your personal and direct supervision, were they not? A. Yes, sir.

Q. And during that same time you were both a director and general manager of Bellingham Coal Mines and the manager of coal operations for Northwestern Improvement Company?

A. Yes, sir.

(Testimony of Earl R. McMillan.)

Q. Referring your attention, Mr. McMillan, to Defendant's Exhibit A-6, isn't it a fact, Mr. McMillan, that prior to the transmission of that note to Western Machinery Company by Mr. Herbert Little you approved the transmission of that note to Western Machinery Company?

Mr. Crosby: May I have the question read back to me, please?

The Court: Yes.

(The reporter read the last question.)

A. I do not recall even any knowledge of the transmission [182] of this note.

Q. (By Mr. Shapro): Isn't it a fact, Mr. McMillan, and I want you to be careful, to be precise in your answer to this question, that under date of and that you knew that under date of August 20, 1952, Mr. Ramage sent the note which is now marked Defendant's Exhibit A-6 to Mr. Little for his signature as Secretary, Mr. Ramage signed it, with express directions to and that Mr. Little did take up with you before mailing the note to Western Machinery Company the fact that it should be sent?

The Witness: Could I ask to have the question reread?

The Court: It will be read.

(The reporter read the last question.)

A. I do not recall Mr. Little calling me regarding the note before it was sent.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Shapro): Would you say that he didn't contact you about it before?

A. I wouldn't say that he didn't, no, sir.

Q. Now, Mr. McMillan, isn't it a fact that the issuance of this note, Defendant's Exhibit A-6, was discussed by you with other officers and other directors of the Bellingham Coal Mines Company before it was sent to Western Machinery Company? [183]

A. It was discussed between the Board—or at a Board meeting. I don't recall offhand whether it was before or after the note had actually been sent.

Q. You wouldn't say that there were no discussions with you and other members of the Board or between you and other members of the Board concerning this note before it was sent to Western Machinery?

A. I have no recollection of any discussion of the note before it was sent.

Q. When did you first hear about the note?

A. On or about the time it was sent, or shortly thereafter.

Q. But you're sure you didn't hear about it before it was sent?

A. I wouldn't say that I hadn't heard about it, no.

Q. Did you ever object to the issuance or transmission of this note to Western Machinery Company? A. No, sir.

Q. Now, Mr. McMillan, you have testified that in, I think it was, the last day of July or the early part of August of 1952, which was before this note

(Testimony of Earl R. McMillan.)

was issued, that you received a telephonic request for payment from Western Machinery Company through a Mr. Goering; is that right?

A. That's right.

Q. Is that the first direct contact that you had with [184] Western Machinery Company concerning payment for this washing plant?

A. I don't recall that it was the first contact or not.

Q. You say you don't recall that it was the first, is that right? A. I do not recall that it was.

Q. Do you recall any prior contacts of that sort?

A. I do not recall any prior contact.

Q. In that conversation with Mr. Goering that took place about the last part of July, 1952, isn't it a fact that you told Mr. Goering that you hoped to be able to send between fifteen and twenty-five thousand dollars or have that much sent on this account and that you hoped that he would bear with you for the balance for a while?

A. I can't answer the latter part of that question the same as I would the first part of it.

Q. Well, then you break it up and answer it in two parts, if you will.

The Witness: Could I have the question read back, please?

The Court: That will be done.

(The reporter read the question beginning Line 9, this page.)

A. The answer to the first part of the question

(Testimony of Earl R. McMillan.)

is yes. [185] The answer to the second part of the question I would modify by saying yes, having reference to Bellingham Coal Mines Company, not me personally.

Q. (By Mr. Shapro): All right. Now, there was no inference, I want you to understand, sir, in my question that you personally undertook to pay this bill. There is no such contention. But you did then and in your own mind, referring to Bellingham Coal Mines Company, ask for the forbearance of the Western Machinery Company on this account, didn't you? A. That's right.

Q. Isn't it true also, Mr. McMillan, that after the note was issued and received by Western Machinery Company, that to your knowledge there were several requests for extensions of time for the payment of it after it became due on August the 18th, 1952—November the 18th, 1952?

A. Yes, sir.

Q. And isn't it fact, Mr. McMillan, that on several of those occasions you personally requested Mr. Little to ask for such forbearance on the note?

A. No, sir.

Q. Is it your testimony that you did not personally discuss with Mr. Little and suggest to him or ask that he contact Western Machinery Company or me for further [186] time on the payment of this note?

A. First, I don't understand what you mean by "personally." As a member—

Q. I mean vocally through your own mouth, sir.

(Testimony of Earl R. McMillan.)

A. As a member of the Board of Directors of Bellingham Coal Mines Company I concurred in the request of the other members of the Board that extension be granted.

Mr. Shapro: Might I have the answer read, your Honor?

The Court: You may.

Mr. Shapro: Thank you.

(The reporter read the last answer.)

Q. (By Mr. Shapro): During this same period of time covered by this last answer, Mr. McMillan, you still were manager of coal operations of Northwestern Improvement Company, weren't you?

A. Yes, sir.

Mr. Shapro: May I have these marked for identification, your Honor?

The Court: You may.

The Clerk: It will be marked Plaintiff's Exhibit No. 7.

(Three letters of transmittal and four invoices of Western Machinery Company were marked Plaintiff's Exhibit No. 7 for identification.) [187]

Mr. Shapro: Your Honor, might I state for brevity's sake, and Counsel I'm sure will agree, that the documents that your Honor has before him that have been marked Plaintiff's 7 represent a group of letters of transmittal of the bills of lading which have been already received in evidence as Defendant's Exhibits A-16 and A-17.

(Testimony of Earl R. McMillan.)

Mr. Crosby: Except as to one bill of lading. One of the bills of lading did not have any letter of transmittal.

Mr. Shapro: I will accept Counsel's stipulation.

Mr. Crosby: And I think that probably we should include in that stipulation which bill of lading it was.

Mr. Shapro: If you will make the statement of qualification I will accept it.

Mr. Crosby: The defendant will stipulate that the group of letters that has been marked Plaintiff's Exhibit No. 7 accompanied the bills of lading marked Defendant's Exhibits A-16 and A-17 except as to one bill of lading and packing list in Defendant's Exhibit A-17, and that exception is the bill of lading from Cutler-Hammer, Inc.

Mr. Shapro: I will accept that stipulation, [188] your Honor. May the witness be shown Plaintiff's Exhibit 7, your Honor?

The Court: That will be done.

(The bailiff handed the exhibit to the witness.)

Q. (By Mr. Shapro): Will you examine those letters of transmittal please, Mr. McMillan?

(Brief pause.)

A. Yes, sir.

Q. Having examined the contents of Plaintiff's Exhibit 7, Mr. McMillan, can you tell the Court that it is a fact that the bills of lading which com-

(Testimony of Earl R. McMillan.)

prise Exhibits A-16 and A-17 with the exception of the Cutler-Hammer bill of lading were actually transmitted to Northwestern Improvement Company by Western Machinery Company?

A. Apparently some of them were. I can't be sure that——

Q. Well, just so the record will be straight, Mr. McMillan, Mr. Crosby has stipulated that those letters of transmittal refer to the bills of lading which are described in Exhibits A-16 and A-17 except the Cutler-Hammer bill of lading. Having that stipulation in mind, is it not a fact that the bills of lading in question, namely in A-16 and A-17 with the exception of Cutler-Hammer, were transmitted by Western Machinery Company directly to Northwestern Improvement Company? [189]

A. I don't know that they were transmitted directly. They evidently eventually reached the office of Northwestern Improvement Company.

Q. Isn't it a fact, Mr. McMillan, that the letters of transmittal were directed to and received by the Northwestern Improvement Company?

Mr. Crosby: I submit, your Honor, the letters are self-explanatory.

The Court: This is cross-examination, is it not?

Mr. Crosby: I realize that, but it is argumentative with the witness. The letters are fully self-explanatory.

Mr. Shapro: I would say cross-examination is permissible.

(Testimony of Earl R. McMillan.)

The Court: I would say there is a reasonable limit on that. The objection is overruled.

Q. (By Mr. Shapro): Do you recall the question, sir? A. May I have the question read?

(The reporter read the question beginning Line 4, this page.)

A. Yes, sir.

Mr. Shapro: We offer at this time in evidence, your Honor, Plaintiff's Exhibit No. 7.

Mr. Crosby: I have no objection. [190]

The Court: Admitted.

(Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Mr. Shapro: Your Honor, if it would be possible and convenient to the Court might I suggest a morning recess for about five minutes now? It would enable me to have the opportunity to review the notes on the direct testimony of the witness.

The Court: That is agreeable. Court will be at recess for approximately ten minutes.

Mr. Shapro: Thank you, your Honor.

(Short recess.)

The Court: The witness will resume the stand.

EARL R. McMILLAN

resumed the stand.

Mr. Shapro: May the witness be shown Defendant's Exhibit A-5, your Honor?

(Testimony of Earl R. McMillan.)

The Court: That will be done.

(Defendant's Exhibit No. A-5 was handed to the witness.)

Cross-Examination
(Continued)

By Mr. Shapro:

Q. Mr. McMillan, will you examine the letter dated August 15, '52, which is Defendant's Exhibit A-5, and when you have read it I will address another question to you. [191] Will you read that letter, not out loud, just to yourself.

(Brief pause.)

A. Yes, sir.

Q. Referring your attention, Mr. McMillan, to the second paragraph of that letter that begins, "Mr. McMillan advises us," and so forth, do you have that?

A. Yes, sir.

Q. It is a fact, is it not, Mr. McMillan, that after your telephone conversation with Mr. Goering, which as you testified yesterday involved a suggestion from him or request that a conditional bill of sale, as you called it, be given on this equipment for security purposes, you did communicate that to Mr. Ramage, didn't you?

A. Yes, sir.

Q. And isn't it also a fact, Mr. McMillan, that the directors of Bellingham Coal Mines Company suggested as an alternative or a substitute for the conditional bill of sale requested by Mr. Goering

(Testimony of Earl R. McMillan.)

that this note which is Defendant's Exhibit A-6 be given? A. I don't recall any such discussion.

Q. When in your presence was the issuance of this note to Western Machinery Company discussed for the first time? [192]

A. I don't remember when it was discussed.

Q. Do you remember with whom you first discussed the note?

A. As I said before, the only recollection I have was of a discussion in a Board of Directors meeting. I don't recall the date.

Mr. Shapro: I have no further questions, your Honor.

The Court: Anything further, Mr. Crosby?

Redirect Examination

By Mr. Crosby:

Q. Mr. McMillan, with reference to Mr. Shapro's question on cross-examination about Northwestern Improvement Company getting twenty per cent plus expenses, Mr. McMillan, what expenses was the Northwestern Improvement Company to get a twenty per cent override on?

A. The twenty per cent commission applied only to the services of the personnel loaned by the Northwestern Improvement Company to the Bellingham Coal Mines Company plus any supplies, mine supplies, or equipment furnished from Northwestern Improvement Company's mine at Roslyn to Bellingham Coal Mines Company, plus—well, I think

(Testimony of Earl R. McMillan.)

I've covered it. I was thinking of the engineering services.

The Court: I would like to know what this [193] twenty per cent commission was on. On what was it computed?

The Witness: Your Honor, it was computed on the prorated time of myself, for example, and the general superintendent of our mine at Roslyn for the time that he gave directly—

The Court: You are not getting at the meat of my question. I want to know on what principle you applied the factor of twenty per cent in your calculations to determine what the twenty per cent was in dollars and cents. What was the principle on which you multiplied or which was multiplied by twenty per cent in order to find out the dollars and cents equivalent of twenty per cent?

The Witness: Your Honor, for example—may I illustrate it?

The Court: I think you could say it in words, Mr. McMillan. If you can't, that will be sufficient.

The Witness: Well, the twenty per cent was multiplied by the proportion of my salary that was chargeable to the Bellingham Coal Mines Company, and the same for all the other personnel services given to the Bellingham Coal Mines Company.

The Court: I would like to know what you did to find out the principle to which you applied this [194] factor of twenty per cent as a multiplier.

The Witness: In the case of my salary, a fixed ratio or percentage of my salary was charged—

The Court: I don't care anything about the per-

(Testimony of Earl R. McMillan.)

centage of your salary. I am trying to find out on what you applied that twenty per cent in order to ascertain the twenty per cent of your salary or some other figure. We are not determining the percentage of your salary, we are trying to determine the percentage of something by which your salary was determined.

The Witness: Well, sir, your Honor, my salary—the salary to which I refer was my salary paid by Northwestern Improvement Company to me. Now, part of that salary was charged to the Bellingham Coal Mines Company.

The Court: Yes, sir, but I would just like to know how you determined how much it was, if it was twenty per cent of some kind of business done by Bellingham Coal Mines Company through the management of the Northwestern Improvement Company or your personal services irrespective of the corporation. I would like to know what it is. If you lend me a hundred dollars at six per cent, we multiply 100 by 6 to find out how many dollars it is. That is what I am trying to find out. What is the principle on which you used the [195] factor of twenty per cent?

The Witness: Well, except for my own salary, your Honor, which was the same every month, I don't recall exactly what the amount was, it was probably we'll say two hundred dollars. was charged to Bellingham Coal Mines Company, and twenty per cent was added to that and charged against the Bellingham Coal Mines Company. Now, in every other instance of the personnel it varied from month

(Testimony of Earl R. McMillan.)

to month depending upon how much time——

The Court: So the principle to which you applied twenty per cent as a multiplier was your salary, is that it, your salary that the Northwestern Improvement Company paid you ordinarily?

The Witness: Yes, sir.

The Court: You may proceed.

Mr. Shapro: Mr. McMillan——

Mr. Crosby: Pardon me.

Mr. Shapro: Oh, I'm sorry. I'm sure that Mr. McMillan has given your Honor unintentionally an erroneous impression of that figure. I would like your Honor's permission to attempt to clarify it, if I may.

The Court: You may do so. [196]

Recross-Examination

By Mr. Shapro:

Q. Mr. McMillan, you didn't intend to imply by the answer to the Court's last question that the only item upon which Northwestern Improvement Company added twenty per cent was the proportion of your salary which was charged to the Bellingham Coal Mines Company, did you?

The Court: The Court did not so understand. The Court understood that when he worked for them it applied in his case and when somebody else did work a like percentage of salary was added to the bill for services addressed to the Bellingham Coal Mines Company.

Q. (By Mr. Shapro): It is also true, Mr. Mc-

(Testimony of Earl R. McMillan.)

Millan, is it not, that to the cost of materials supplied to Bellingham Coal Mines Company by Northwestern Improvement Company was added twenty per cent?

A. The material was supplied from Roslyn, yes, sir.

The Court: Was that twenty per cent paid to you by the Bellingham Coal Mines Company personally directly or was it paid to the Northwestern Improvement Company?

The Witness: The Bellingham Coal Mines Company paid the Northwestern Improvement Company.

Q. (By Mr. Shapro): It is also true, Mr. McMillan, is it not, that in certain instances equipment which was [197] purchased by and owned by Northwestern Improvement Company and used by Bellingham Coal Mines Company was billed to Bellingham Coal Mines Company by Northwestern at cost plus twenty per cent?

A. I don't recall any items that were purchased from outside sources and furnished to Bellingham and then twenty per cent added to that.

Q. But how about equipment that was already in the possession of and owned by Northwestern Improvement Company, loaned to and used by Bellingham Coal Mines Company? There was such equipment, wasn't there?

A. Yes, sir, but that was under a rental arrangement.

Q. And isn't it true that to the rental arrange-

(Testimony of Earl R. McMillan.)

ment there was added twenty per cent by Northwestern Improvement Company?

A. I do not believe that twenty per cent of the rental was loaded onto the rental.

Q. Would you say it wasn't?

A. Not without looking at the records.

Q. Was the rental rate for equipment of Northwestern Improvement Company leased to or used by the Bellingham Coal Mines Company the standard rental rate or was it a figure arrived at by you?

A. It was arrived at by me because I was manager of the Bellingham Coal Mines Company. [198]

Q. And you were also the manager of coal operations at the same time of Northwestern Improvement Company, weren't you? A. Yes, sir.

Mr. Shapro: I have no further questions.

Redirect Examination

By Mr. Crosby:

Q. Mr. McMillan, did the Northwestern Improvement Company ever receive a twenty per cent override or commission on any services of employees of the Bellingham Coal Mines Company or on equipment that was purchased directly by the Bellingham Coal Mines Company?

A. No, sir.

Q. Did the Northwestern Improvement Company ever receive any twenty per cent commission or bill the Bellingham Coal Mines Company for a twenty per cent commission on the machinery that

(Testimony of Earl R. McMillan.)

was being obtained from Western Machinery Company? A. No, sir.

Q. As to any rental agreement for rental of equipment that was furnished by the Northwestern Improvement Company to the Bellingham Coal Mines Company, was the rental agreement approved by the Board of Directors of the Bellingham Coal Mines Company? [199] A. Yes, sir.

Mr. Crosby: I have no further questions.

The Court: This witness may step down.

(Witness excused.)

The Court: I ask you to consider accommodating professional men who may be called as witnesses. We try to do it in the case of doctors. I do not see any reason why we should not try to do it in the case of lawyers.

Mr. Shapro: We would like to do that, your Honor.

The Court: I wish you would do that.

Mr. Crosby: I would like to call Mr. Little, please.

The Court: Come forward and be sworn as a witness.

HERBERT S. LITTLE

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Mr. Crosby: Might the witness be handed Defendant's Exhibits A-6 and A-9, and I would like to have this letter marked.

(Testimony of Herbert S. Little.)

The Clerk: Defendant's Exhibit No. A-18.

(A letter dated November 17, [200] 1952, from E. J. Barshell to Herbert S. Little, was marked Defendant's Exhibit No. A-18 for identification.)

The Court: For the record, Mr. Crosby, let the witness state his name.

Direct Examination

By Mr. Crosby:

Q. Will you please state your name?

A. Herbert S. Little.

Q. What is your profession, Mr. Little?

A. I'm an attorney at law.

Q. With what law firm are you associated?

A. With the firm of Little, LeSourd, Palmer, Scott & Slemmons.

Q. Where is that firm located?

A. Hoge Building, Seattle.

Q. Have you ever been associated with the Bellingham Coal Mines, Incorporated, Mr. Little?

A. Yes.

Q. What was your relationship with that company?

A. Well, our firm was the general counsel for it and I was Secretary of the company and a member of the Board.

Q. During what period of time did that relationship exist?

A. From the time of its incorporation until it went into [201] Bankruptcy Court.

(Testimony of Herbert S. Little.)

Q. What year was it incorporated?

A. I would—I'm just thinking out loud. I think it was about 1950 or '51.

The Court: Did the company take over some new or some old mining properties?

The Witness: Well, it took over the old mining properties of what was known as the Bellingham Coal Mines. It acquired and issued stock for the leasehold interest and all of the buildings and equipment and also issued stock for a partial liquidating dividend.

The Court: With reference to the life of the Bellingham community, I mean regarding the length of time, what part of that community life length was this old company and mine associated, if you know?

The Witness: Approximately I would say 1918 or '19 to 1950 was the old company. That's rough, but I think it was 1918 or '19.

The Court: You may inquire.

Q. (By Mr. Crosby): Mr. Little, did the Bellingham Coal Mines Company have any association with the Northwestern Improvement Company?

A. Yes, it did.

Q. What was the nature of that association?

A. Well, first of all Mr. McMillan, who was the manager [202] of Northwestern Improvement Company, was also the operating manager of the Bellingham Coal Mines. In the second place, we—at least we negotiated an agreement between Bellingham Coal Mines and—that is the new company, and

(Testimony of Herbert S. Little.)

Northwestern Improvement Company with reference to management, the agreement which Mr. McMillan has just described.

Q. Mr. Little, would you please state whether or not the agreement, any agreement between the Bellingham Coal Mines Company and the Northwestern Improvement Company provided for the Northwestern Improvement Company to get any commission or compensation for equipment or supplies that were purchased or paid for by the Bellingham Coal Mines Company?

A. Well, the agreement which was prepared and acted upon did contain such a provision. I said acted upon because I think, as you know, it was not formally executed by Bellingham Coal Mines.

Q. Did I understand you to say where the Bellingham Coal Mines Company purchased equipment?

A. No, I wasn't talking about that. I was just talking about the execution of the agreement.

Mr. Crosby: Might we have the previous question read back to the witness?

The Court: It will be read. [203]

(The reporter read the question back as follows:

“Q. Mr. Little, would you please state whether or not the agreement, any agreement between the Bellingham Coal Mines Company and the Northwestern Improvement Company provided for the Northwestern Improvement Company to get any commission or compensa-

(Testimony of Herbert S. Little.)

tion for equipment or supplies that were purchased or paid for by the Bellingham Coal Mines Company?")

A. I'm sorry, I misunderstood your question. I'm quite sure it did not.

Q. (By Mr. Crosby): Did the Bellingham Coal Mines Company consider under the terms of their agreement with Northwestern Improvement Company that the Northwestern Improvement Company was entitled to get any commission or profit from the purchase of the equipment from the Western Machinery Company?

Mr. Shapro: I object to that question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: Read the question. [204]

(The reporter read the last question.)

The Court: He is asking as a matter of fact.

Mr. Shapro: The word that I object to specifically is "consider." That is a state of mind.

The Court: The objection is sustained. You may ask a question in proper form and subject matter.

Q. (By Mr. Crosby): Did the Bellingham Coal Mines Company pay any twenty per cent commission to the Northwestern Improvement Company on any sums that the Bellingham Coal Mines Company paid to the Western Machinery Company toward the coal washing plant?

A. Not to my knowledge.

(Testimony of Herbert S. Little.)

Q. Mr. Little, referring to Defendant's Exhibit A-6—

A. Yes, I have it before me.

Q. Are you familiar with Exhibit A-6, Mr. Little.

A. I am.

Q. Please state whether or not you ever had any conversations with representatives of the Western Machinery Company relative to A-6.

A. I did.

Q. When was your first conversation—approximately when was your first conversation with such representative and who was it, please?

A. Well, I had—I talked with Mr. Barshell over long distance telephone—I was in Seattle, he was in San [205] Francisco—with reference to the delinquent account, and it was following one or more of the conversations with reference to our indebtedness to the Western Machinery Company that—

Q. Pardon me, Mr. Little. First did you have anything to do with the sending of this note or the preparation of the note?

A. Yes, I mailed it.

Q. Yes. Prior to the mailing of the note did you have any conversation with representatives of the Western Machinery Company about the note?

A. Yes.

Q. And with whom did you have a conversation?

A. Mr. Barshell.

Q. Under what circumstances was the conversation held?

A. Well, he called me long distance and stated

(Testimony of Herbert S. Little.)

in substance that the company was somewhat over-extended because of all of the contracts they had outstanding, the work that they were doing, and that the bank was pressing them for payment and inquiring about this indebtedness of Bellingham Coal Mines, and I believe that at that time he stated to me that they would like to have a chattel mortgage or a conditional sales contract. I told him that we couldn't give any such chattel mortgage, that's my best recollection, that we couldn't [206] do it because it would constitute a preference in my opinion. He then said, "Well, can you at least give us a promissory note which will draw interest and which we can in turn assign to the bank," which I think was the American Trust Company, but I'm not positive, and so then that matter was taken up with Mr. Ramage and with the Board of Bellingham Coal Mines.

Q. Referring to Defendant's Exhibit A-9, is that a letter that you wrote, Mr. Little? A. It is.

Q. And to whom did you send the letter and what was enclosed with the letter?

A. The letter was to Mr. Barshell of Western Machinery and the promissory note was enclosed.

Q. I see.

Mr. Crosby: Your Honor, I ask that Defendant's Exhibits A-6 and A-9 be admitted in evidence.

Mr. Shapro: No objection, your Honor.

The Court: They are admitted.

(Defendant's Exhibits Nos. A-6 and A-9 for identification were admitted in evidence.)

(Testimony of Herbert S. Little.)

Q. (By Mr. Crosby): Mr. Little, prior to your sending the note, which is Defendant's Exhibit A-6, did any representative of the Western Machinery Company request through you to have any other company sign on the note [207] along with Bellingham Coal Mines Company?

Mr. Shapro: I will object to that question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial. In other words, we take the position, if your Honor please, that it will not tend to prove or disprove any issue in this case as to whether or not we asked to have somebody else sign the note besides Bellingham.

Mr. Crosby: I think it is very material, your Honor, in this case to show that the plaintiff took a promissory note from Bellingham Coal Mines Company to which machinery was furnished and didn't request the Northwestern Improvement Company to sign on the note. Since they have been contending that the Northwestern Improvement Company was obligated on this bill for the machinery I feel it is very material, and as a matter of fact Counsel, in cross-examining Mr. McMillan, inquired relative to whether or not his approval was requested about the note.

Mr. Shapro: Your Honor, we have a situation here where, as your Honor ruled yesterday, Counsel, in connection with an affirmative defense, can't put in all its case at one time, and I am cognizant of that, but I say to your Honor that on the face of the record we had a contract obligation directly

(Testimony of Herbert S. Little.)

with Northwestern [208] Improvement Company. The mere fact that we took, and even as the witness testifies we requested a note from Bellingham Coal Mines Company, would not change the other situation and that we were not required as a matter of law to take any affirmative action such as to preserve our rights against Northwestern such as to ask that they join in the note, too. We already had, and so far as we are concerned we still have, the direct and primary obligation, an original obligation of Northwestern Improvement Company.

The Court: The objection is overruled.

A. I do not recall any request on the part of any representative of Western Machinery on or about this time for the signature of any other party.

Q. (By Mr. Crosby): Mr. Little, referring to what has been marked as Defendant's Exhibit A-18, do you recognize that?

A. I have it before me, yes.

Q. What is that exhibit, Mr. Little?

A. It's a letter, dated November 17, 1952, from Western Machinery Company, signed by Mr. Barshell, addressed to me.

Q. And generally what is the subject matter of the letter?

A. Mr. Barshell expresses sorrow about——

The Court: No, just the nature of the [209] letter or the subject matter discussed in it.

A. It's a letter relating to the payment of the

(Testimony of Herbert S. Little.)

account of Bellingham Coal Mines with Western Machinery.

The Court: Will you speak the clerk's identifying mark if you see it on there?

A. Defendant's A-18.

The Court: Thank you. You may inquire.

Mr. Crosby: I ask that Defendant's Exhibit A-18 be admitted in evidence.

Mr. Shapro: No objection.

The Court: It is admitted.

(Defendant's Exhibit No. A-18 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Little, following your transmittal of the promissory note which is Defendant's Exhibit A-6 to the Western Machinery Company did you have any other conversations with representatives of the Western Machinery Company relative to payment of the note?

A. Yes.

Q. Do you have any idea how many?

A. I really can't tell you how many. There probably were several, maybe two or three. Maybe once a month Mr. Barshell would phone me or I might phone him to tell him the status of the R. F. C. application, and then later on, I've forgotten how much later but later on [210] I had a call from Mr. Shapro and talked with Mr. Shapro, but that was several months later.

Q. Was there any correspondence, Mr. Little, exchanged between your office by you and the West-

(Testimony of Herbert S. Little.)

ern Machinery Company relative to the payment of the note which is Defendant's Exhibit No. A-6?

A. There was an exchange of correspondence, several letters backward and forward.

Q. At any time prior to your receiving a call from Mr. Shapro in the conversations that you had with representatives of the Western Machinery Company or in the correspondence with them, was there any reference to Northwestern Improvement Company's responsibility on the promissory note?

A. Not until——

Mr. Shapro: If your Honor please, I'm going to object to that question on the ground that it's leading and suggestive and assumes a fact not in evidence, namely, that there was any contention at any time that Northwestern Improvement Company is responsible on this note. The note is the Bellingham Coal Mines' note.

The Court: The objection is overruled.

A. To the best of my knowledge there was no statement with reference to any liability of Northwestern Improvement [211] Company that came to my attention until somewhere around January or February or March, I think February, 1953. That was the first time I think I heard about it.

Mr. Crosby: I have nothing further, your Honor.

The Court: You may cross-examine.

Mr. Shapro: Yes, your Honor.

(Testimony of Herbert S. Little.)

Cross-Examination

By Mr. Shapro:

Q. Mr. Little, you testified on direct examination that the issuance or the execution and delivery of this note to Western Machinery Company was discussed by you with the Board of Directors of Bellingham Coal Mines Company, is that correct?

A. It was.

Q. And was Mr. McMillan present at those discussions? A. Yes, I'm sure he was.

Q. It's a fact, is it not, Mr. Little, that at the time you transmitted this promissory note to Western Machinery Company you did not know and had not previously been advised by anyone of the fact that the original order for this equipment and the original invoice for this equipment was from Western Machinery Company to Northwestern Improvement Company? [212]

A. That is correct.

Q. In your conversation with Mr. Barshell at which the note was suggested it is true, is it not, Mr. Little, that no mention was made by you or by Mr. Barshell of releasing the Northwestern Improvement Company by reason of the acceptance or the delivery of this note?

A. It wasn't even mentioned.

Q. It wasn't even mentioned? A. No, sir.

Q. It's also true, is it not, Mr. Little, that the extensions of time or indulgence that you, on be-

(Testimony of Herbert S. Little.)

half of Bellingham Coal Mines Company, asked in connection with the claims of Western Machinery Company prior to the note were done at the request of the Board of Directors of Bellingham Coal Mines Company?

A. Yes. We couldn't pay our debts.

Q. And it's true also, is it not, that those requests were discussed before they were made by you with members of the Board of Directors of Bellingham Coal Mines Company?

A. On several occasions we were discussing the fact that the R. F. C. loan hadn't come through and we were unable to pay for most items of equipment.

Q. And you were requested as a result of some of those meetings to contact either Mr. Barshell or some other [213] representative of the Western Machinery Company to obtain indulgence on the claim, isn't that right?

A. Yes, as well as other creditors.

Q. As well as other creditors, and it's true, is it not, that Mr. McMillan participated in those meetings? By "the meetings," I mean the meetings as a result of which you were requested to make these applications for credit indulgence.

A. Yes. I'm not sure whether he was at every meeting. I think he was, because he was an important employee of the company and we naturally arranged meetings so that he could be present, but the minutes themselves would be the best evidence

(Testimony of Herbert S. Little.)

of that. But he was at most if not all of the meetings.

Q. Isn't it a fact also, Mr. Little, that the only contact personally between the Bellingham Coal Mines Company and Northwestern Improvement Company was with Mr. McMillan?

A. Well, that I can't positively answer. I'd say, generally speaking, that would be true because he was manager of both, but there may have been occasions when directors or officers might have talked with other representatives of Northwestern Improvement. I know of none myself, but there could have been.

Q. My question, of course, was limited to your own [214] knowledge, Mr. Little? A. Yes.

Q. Now, Mr. Little, it's true, is it not, also that before——

A. May I make one exception to that?

Q. Certainly.

A. There was a time when I talked with the attorney for Northwestern Improvement Company, but that was months later.

Q. And that was after the issuance of the note?

A. Long after.

Q. And it was after you had been informed, as you previously testified, for the first time that there was some claim directly against Northwestern?

A. That's correct.

Q. That would be in the early part of 1953?

A. Yes, I think so.

(Testimony of Herbert S. Little.)

Q. And wasn't it at the time that I visited your office here in Seattle for that purpose?

A. That's correct.

Q. Isn't it a fact also, Mr. Little, that prior to your transmission of this note to Western Machinery Company by your letter of August 23rd, which is Defendant's Exhibit A-9, that you went over the note or discussed prior to its transmission the transmission of the note [215] with Mr. McMillan?

A. I believe I did. I'm not positive as to any particular conversation with Mr. McMillan about it. I received the note from Mr. Ramage, I had the approval of the Board to execute it and send it down, and I believe I discussed it with Mr. McMillan but it's hard for me to refresh my recollection.

Q. I'll attempt to do so in a moment, Mr. Little.

A. Fine.

The Clerk: Plaintiff's Exhibit No. 8.

(Copy of letter, dated Aug. 20, 1952, from Jas. S. Ramage to Herbert S. Little, was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Shapro): Mr. Little, I show you Plaintiff's Exhibit No. 8, and after you have read it I will ask you whether or not that refreshes your recollection as to the circumstances under which you received and transmitted the note in question

(Testimony of Herbert S. Little.)

with reference to prior approval thereof by Mr. McMillan.

A. Yes, after reading this exhibit, Plaintiff's Exhibit 8, I recall after receiving the note from Mr. Ramage pursuant to his request I discussed with Mr. McMillan the discrepancy in the amount, and we decided the discrepancy was not important enough to delay sending the note down to Mr. Barshell. [216]

Q. Am I correct in understanding from your testimony, Mr. Little, that the letter which you have in your hand and marked Plaintiff's Exhibit 8 is the letter of transmittal to you of the note signed by Mr. Ramage prior to a signature by you?

A. That's correct.

Q. And am I also correct in understanding from your testimony, Mr. Little, that pursuant to that letter from Mr. Ramage, Plaintiff's Exhibit 8, you proceeded to follow out the instructions or suggestions contained therein from Mr. Ramage?

A. Yes, and I can further refresh my recollection by Defendant's Exhibit A-9, my letter to Mr. Barshell, in which I state that I have discussed it with Mr. McMillan.

Mr. Shapro: We offer in evidence at this time, if your Honor please, the document marked Plaintiff's Exhibit 8.

Mr. Crosby: I have no objection, your Honor.
The Court: Admitted.

(Plaintiff's Exhibit No. 8 for identification was admitted in evidence.)

(Testimony of Herbert S. Little.)

The Court: What do you call it?

Mr. Shapro: It is a letter from the President of the Bellingham Coal Mines to Mr. Little enclosing the note for signature and transmission to [217] Western Machinery Company after it was to be discussed with Mr. McMillan.

Q. (By Mr. Shapro): You testified, Mr. Little, I believe at the opening of my cross-examination that the issuance of this note to Western Machinery Company was discussed by you with the Board of Directors before it was issued. Is that right?

A. Yes, sir.

Q. And that Mr. McMillan was a member of the Board and present at that meeting, is that correct?

A. Well, I said that I'm sure that he was at a Board meeting when the giving of the note was discussed. Whether he was at all of the meetings at which it was discussed or not, I don't know.

Mr. Shapro: I have no further questions, your Honor.

The Court: Anything further?

Mr. Crosby: I have no further questions, your Honor.

The Court: You may be excused, Mr. Little.

(Witness excused.)

Mr. Koch: May I address the Court for just a moment, your Honor?

The Court: Yes, that is agreeable, Mr. Koch.

Mr. Koch: In order to spare Mr. Little, [218] he is a rebuttal witness and we would be glad to

put him on now out of order in order that he not have to return.

The Court: I can't very well do it now. He will have to return anyway, Mr. Koch. I will have to ask that he come back this afternoon if you need to use him again.

Mr. Shapro: I don't want to discommode Mr. Little in the least. If your Honor will give me just a moment we may be able to dispense with any further attendance.

Mr. Little: Thank you. I will appreciate it.

Mr. Shapro: Just a moment, Mr. Little.

(Brief pause.)

Mr. Shapro: May I ask one more question of Mr. Little on cross-examination?

The Court: You may.

Mr. Shapro: Thank you, your Honor.

HERBERT S. LITTLE

resumed the stand.

Cross-Examination

(Continued)

By Mr. Shapro:

Q. Am I correct in my understanding, Mr. Little, of your testimony that when you told Mr. Barshell that a contract of conditional sale or a chattel mortgage as far as Western Machinery Company was not acceptable because it might be a preference by reason of the [219] financial condition then of Bellingham Coal Mines Company, that you, or was

(Testimony of Herbert S. Little.)

it he that suggested the promissory note? I just want to be sure as to who from your testimony suggested it.

A. It was—I frankly am unable to refresh my recollection completely whether it was he who asked me or whether it was I who suggested it. I know that I did tell him that I would recommend that the Bellingham Coal Mines give Western Machinery a promissory note and pay interest because of their forbearance, and so I told him I would recommend it. Now, whether he requested it because of the desire to assign the note to the bank or whether I suggested it and then he welcomed the suggestion in lieu of a chattel mortgage, my direct recollection isn't too clear.

Q. Thank you, Mr. Little.

Mr. Shapro: Thank you, your Honor. We will have no further examination of Mr. Little.

The Witness: Thank you.

The Court: Is there any objection to excusing him permanently?

Mr. Crosby: I have no objection, your Honor.

Mr. Shapro: No, your Honor.

The Court: You may be permanently excused, Mr. Little. [220]

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: At this time we will take the noon recess until 1:45.

(At 12:00 o'clock noon a recess was taken until 1:45 o'clock p.m.)

Friday, June 15, 1956—1:45 o'Clock P.M.

(All parties present as before.)

The Court: You may proceed with the case on trial.

Mr. Crosby: I would like to call Mr. Barshell.

The Court: Come forward, Mr. Barshell. You have already been sworn. You may now take the stand as a defendant's witness.

EDWIN J. BARSHELL

recalled as a witness in behalf of defendant, being previously duly sworn, was examined and testified further as follows:

Mr. Crosby: Might the witness be handed Defendant's Exhibits A-6, A-7, A-8 and A-9?

The Court: That will be done. [221]

(The exhibits referred to were handed to the witness.)

Mr. Crosby: And might these purchase orders of Western Machinery Company be marked as one exhibit? Is that satisfactory, Counsel?

Mr. Shapro: That is satisfactory.

The Clerk: They will be marked Defendant's Exhibit A-19.

(A group of purchase orders of Western Machinery Co was marked Defendant's Exhibit No. A-19 for identification.)

Direct Examination

By Mr. Crosby:

Q. Mr. Barshell, referring to Defendant's Ex-

(Testimony of Edwin J. Barshell.)

hibit No. A-8, would you please state what that is?

A. The ledger account of the Northwestern Improvement Company in the records of the Western Machinery Company.

The Court: Which exhibit is that?

A. Exhibit A-8, your Honor.

The Court: A-8. You may proceed.

Q. (By Mr. Crosby): The purchase of what equipment does that cover, Mr. Barshell?

A. The purchase of a coal washing plant.

Q. To whom was the coal washing plant delivered, Mr. Barshell? [222]

A. Without reference to the bills of lading I wouldn't know, Mr. Crosby.

Q. Does the Western Machinery Company have any other accounts receivable ledger covering the equipment which was delivered to the Bellingham Coal Mines Company at Bellingham, Washington?

A. Are you speaking of this same equipment?

Q. Yes, Mr. Barshell. A. No.

Mr. Crosby: May the witness be handed Plaintiff's Exhibits 3 and 4, please?

(The exhibits were handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, would you please look at Plaintiff's Exhibits 3 and 4, and comparing the amounts shown on those exhibits with the amounts shown on Defendant's Exhibit A-8, would you please state whether or not the accounts receivable ledger A-8 of the Western Ma-

(Testimony of Edwin J. Barshell.)

chinery Company covers the invoices which are Plaintiff's Exhibits 3 and 4?

A. Plaintiff's Exhibit 3 is reflected on Defendant's Exhibit A-8.

Mr. Crosby: Your Honor, I would like to ask that Defendant's Exhibit A-8 be admitted in evidence.

Mr. Shapro: No objection, your Honor.

The Court: Admitted. [223]

(Defendant's Exhibit No. A-8 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-6—

The Court: That is the promissory note, I believe.

Q. (By Mr. Crosby): —which is the promissory note, and Defendant's Exhibit A-7, would you please first state what Defendant's Exhibit A-7 is?

A. Defendant's Exhibit A-7 is a ledger sheet reflecting the note receivable of the Bellingham Coal Mines.

Q. Would you please state whether or not Defendant's Exhibit A-7 reflects the amount due under the promissory note which is Defendant's Exhibit A-6?

A. The original entry on Defendant's Exhibit A-7 reflects the amount of the promissory note.

Mr. Crosby: I would like to ask that Defendant's Exhibit No. A-7 be admitted in evidence.

Mr. Shapro: If your Honor please, we object

(Testimony of Edwin J. Barshell.)

to the introduction of Defendant's Exhibit A-7 upon the ground that no proper foundation is laid and that it will not tend to prove or disprove any issue in this case. It follows along with the same line of objection we made to the note itself. This is a note receivable ledger sheet which the witness has identified. [224]

The Court: The objection is overruled. Defendant's Exhibit A-7 is now admitted.

(Defendant's Exhibit No. A-7 for identification was admitted in evidence.)

The Court: What is the status, according to your record, Mr. Clerk, as to Defendant's Exhibit A-6?

The Clerk: That has been admitted, your Honor.

The Court: You may proceed.

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-9, would you please state whether or not the Western Machinery Company received that letter in connection with the promissory note which is Defendant's Exhibit A-6?

A. It did.

Q. Would you please read from Defendant's Exhibit A-9, which is Mr. Little's letter to the Western Machinery Company, dated August 23rd, part way down in the middle of the second paragraph, starting with the words, "So that you may have"——

A. "So that you can have"?

Q. "So that you can have."

A. Yes.

(Testimony of Edwin J. Barshell.)

Q. Having that in mind, would you please state what the Western Machinery Company did with the promissory note, A-6, following receipt of the note by the Western [225] Machinery Company?

Mr. Shapro: I object, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial as to what the plaintiff did with the note after its receipt. No foundation has been laid.

The Court: Overruled.

A. The Western Machinery Company discounted the note with its bank.

Q. (By Mr. Crosby): Which bank, Mr. Barshell?

A. The American Trust Company, San Francisco, California.

The Court: Read the last statement of the witness.

(The reporter read the last answer.)

The Witness: Your Honor, may I—

The Court: Yes.

The Witness: May I insert, it was discounted with recourse.

The Court: What did you understand that that meant in the mind of whoever made that comment?

Mr. Crosby: Your Honor, I move the last comment be stricken as not responsive to the question and as something that could be brought out on cross-examination if opposing Counsel feels that it is important.

Mr. Shapro: The question, your Honor, [226]

(Testimony of Edwin J. Barshell.)

called for what was done, and the witness testified it was discounted with the bank and then said, "with recourse." If that is what was done with it, it is responsive to the question.

Mr. Crosby: I still feel, your Honor, that the question was answered and there was no further question before the witness, and I ask that the independent remark be stricken.

The Court: The Court overrules the objection and denies the request.

Mr. Crosby: May the witness please be handed Defendant's Exhibit A-18?

(The exhibit was handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, would you please state whether or not that is your signature on the letter? A. It is, Mr. Crosby.

Q. And did you prepare the letter?

A. I did, Mr. Crosby.

Q. Did you forward Defendant's Exhibit A-18 to Mr. Little? A. I did.

Mr. Crosby: May the witness please be handed Defendant's Exhibit A-4?

(The exhibit was handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-4 and locating in A-4 the check which is [227] numbered 1017, would you please state what the balance was as of the date of that check or at the time the Western Machinery Company received the check on the promissory note which is Defendant's Exhibit A-6?

(Testimony of Edwin J. Barshell.)

A. At the time this check was received?

Q. At the time that check was received.

A. Mr. Crosby, I would not know.

Mr. Crosby: May the witness please be handed Plaintiff's Exhibit 5 and Defendant's Exhibit A-15?

(The exhibits were handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, will you please examine Defendant's Exhibit A-15 and Plaintiff's Exhibit 5 for a moment?

A. Yes, Mr. Crosby.

Q. Would you please state from Plaintiff's Exhibit 5 what the balance was of the Bellingham Coal Mines open account shown by Exhibit 5 at the time Western Machinery received the Check No. 1017 in Defendant's Exhibit A-4?

A. The balance on Plaintiff's Exhibit 5 reflected a debit balance of \$314.21 on the Bellingham Coal Mines account.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

The Court: You may proceed.

Mr. Crosby: I believe that is all the questions I have. If I may have just one second to [228] check my notes, your Honor—

The Court: You may.

(Brief pause.)

Mr. Crosby: That is all the questions I have of this witness, your Honor.

(Testimony of Edwin J. Barshell.)

Mr. Shapro: Your Honor, may I see the exhibits the witness has before him and has used in his testimony?

The Court: You may.

(The exhibits were handed Mr. Shapro.)

Mr. Crosby: I'm sorry, your Honor, there was one additional exhibit, A-19, which I had marked for identification which I neglected to cover by this witness. Might I have the permission of the Court to——

The Court: You may.

Q. (By Mr. Crosby): Mr. Barshell, would you please refer to Defendant's Exhibit A-19 and state what that is?

A. A duplicate copy of the purchase order issued by Western Machinery Company to the Allis-Chalmers Manufacturing Company.

The Court: Is that thing to which you related, A-19, a part of any exhibit now marked in this case, Mr. Barshell?

A. Exhibit A-19, your Honor, is a duplicate copy of the original purchase order plus change orders [229] Nos. 1, 2 and 3 of a purchase order issued by the Western Machinery Company to the Allis-Chalmers Manufacturing Company.

The Court: Is the latter a part of any exhibit previously marked?

A. Are you asking me, your Honor?

The Court: Yes, I am.

A. Not that I know of, your Honor.

(Testimony of Edwin J. Barshell.)

The Court: You may inquire.

Q. (By Mr. Crosby): Mr. Barshell, would you please state whether or not the equipment shown in Defendant's Exhibit A-19 is a part of the equipment shown in Plaintiff's Exhibit No. 1? And would you like to have No. 1 handed to you?

(Plaintiff's Exhibit No. 1 was handed the witness.)

A. The equipment listed is a part of the equipment shown in—the equipment shown in Defendant's Exhibit A-19 is a part of the equipment shown in Plaintiff's Exhibit No. 1.

Mr. Crosby: Your Honor, I would like to ask that Defendant's Exhibit A-19 be admitted in evidence.

Mr. Shapro: Your Honor, might I ask the Court's permission to request Counsel to state the purpose that he has in mind in offering that [230] evidence? I am frank to say I don't know, and I—

The Court: Let both Counsel look at this, first the defendant's and then plaintiff's.

(Counsel confer privately.)

Mr. Crosby: Do you have any objection?

Mr. Shapro: No, I have no objection, your Honor.

Mr. Crosby: I now ask that Defendant's Exhibit A-19 be admitted in evidence.

The Court: It is admitted.

(Defendant's Exhibit No. A-19 for identification was admitted in evidence.)

(Testimony of Edwin J. Barshell.)

The Court: I wish you would give it a name, Mr. Crosby, if you can do so.

Mr. Crosby: Defendant's Exhibit A-19 is the purchase order of Western Machinery directed to Allis-Chalmers covering a portion of the equipment which was forwarded to Bellingham Coal Mines.

The Court: Didn't the witness say something about it being a duplicate invoice or a duplicate, not purchase—

The Witness: Duplicate purchase order, your Honor.

The Court: Duplicate purchase order.

The Witness: Not the original. [231]

The Court: That is sufficient. Anything else?

Mr. Crosby: Your Honor, the Court may have ruled on my request for admission but I didn't—

The Court: A-19?

Mr. Crosby: Yes, A-19.

The Court: It is admitted.

Mr. Crosby: Thank you, very much. That is all I have of this witness.

The Court: You may cross-examine.

Cross-Examination

By Mr. Shapro:

Mr. Barshell, will you examine Defendant's Exhibits A-8 and A-7, please?

(The exhibits were handed the witness.)

Q. Mr. Barshell, referring your attention to Exhibit A-8 which you identified as the account re-

(Testimony of Edwin J. Barshell.)

ceivable of Northwestern Improvement Company with Western Machinery Company, will you tell me from the record upon receipt of the promissory note from Mr. Little enclosed with his letter of August 23rd what entry was made in the books of Western Machinery Company to reflect that transaction?

A. A journal entry was made giving credit on A-8 and [232] reflecting a debit on A-7 so that we would not have a duplication of assets by reflecting an account receivable and also a note receivable when the amounts of money were still only the same.

Q. Mr. Barshell, when, as you testified, your company discounted this note of Bellingham Coal Mines Company with the American Trust Company, what entry, if any, was made on the books of Western Machinery Company to reflect that transaction?

A. On Defendant's Exhibit A-7 a credit was shown to the Bellingham Coal Mines note receivable account and the offset is a debit to cash received from the bank.

Q. Did the Western Machinery Company repurchase that note which is Exhibit A-6?

A. It repurchased that note.

Q. And at that time when it repurchased the note from the bank, the American Trust, what entry, if any, was made in the records of Western Machinery Company to reflect that transaction?

(Testimony of Edwin J. Barshell.)

A. A check was issued by the Western Machinery Company to the American Trust Company for the sum—is that——

Q. Yes.

A. For the sum of \$51,341.99, reflecting principal and interest. The debit for that check was restored to the note receivable ledger reflected on Defendant's [233] Exhibit A-7 as an obligation of the Bellingham Coal Mines.

Q. According to the records of Western Machinery Company as they exist at the present time does Northwestern Improvement Company owe Western Machinery Company any money?

Mr. Crosby: I object to that question as improper cross-examination. The direct examination went to the two ledger sheets in evidence which are Defendant's Exhibits A-7 and A-8, and there was no other direct examination pertaining to ledger sheets of the Western Machinery Company.

Mr. Shapro: Your Honor, if you will examine Exhibits A-8 and A-7 you will find that on A-8 there is a zero balance in the account receivable ledger of this Bellingham Coal Mines account. This is cross-examination.

The Court: If confined to those two exhibits——

Mr. Shapro: My question should have been, if it wasn't, directed to and limited to those exhibits.

The Court: As to what they show?

Mr. Shapro: That's right—no, your Honor. The question that I asked and that I believe is proper is whether, according to the records of Western

(Testimony of Edwin J. Barshell.)

Machinery Company that are before the witness, there is anything [234] owing to Western Machinery Company by Northwestern Improvement Company.

The Court: In view of the possibility of the witness being misled in a too all-inclusive scope of your inquiry the objection is sustained. You may ask a question in proper form.

Q. (By Mr. Shapro): Mr. Barshell, was the account receivable evidenced by Exhibit A-8 of Northwestern Improvement Company ever paid in full?

Mr. Crosby: I object to that question as being improper cross-examination. There was nothing on direct examination about payment. It merely pertained to ledgers.

The Court: This objection is overruled.

Q. (By Mr. Shapro): Do you understand the question, Mr. Barshell, or do you want it read?

A. I would like to have it read.

The Court: Read it, Mr. Reporter.

(The reporter read the question, beginning Line 7, this page.)

A. It was cleared by journal entry.

Q. (By Mr. Shapro): Was any money received in payment of it?

A. \$15,000 of the original balance was received in money.

The Court: The original balance that was [235] shown on that exhibit?

(Testimony of Edwin J. Barshell.)

A. On Exhibit No. A-8, your Honor, which had a balance of \$71,038.71.

Q. (By Mr. Shapro): How much, according to Exhibits A-7 or A-8, whichever—if either indicates that fact, was paid on the promissory note of Bellingham Coal Mines Company after it was received?

A. Mr. Shapro, this ledger sheet has a pencilled notation in my handwriting which indicates a principal amount paid of \$7,089.76 as having actually been received.

Mr. Shapro: That's all, your Honor.

The Court: You may step down.

Mr. Crosby: Your Honor, I have one further question.

The Court: You may do so.

Redirect Examination

By Mr. Crosby:

Q. Mr. Barshell, referring to Defendant's Exhibit A-4, which is a group of checks——

(The exhibit was handed the witness.)

Q. Would you please state whether or not the \$15,000 payment to which you referred a moment ago as being shown on Defendant's Exhibit A-8 was received by you from one of those checks in Defendant's Exhibit A-4? [236]

A. This check was received by Western Machinery Company.

Q. What is the number of the check, please, in Exhibit A-4?

(Testimony of Edwin J. Barshell.)

A. In Exhibit A-4 a check drawn on the Seattle First National Bank at Bellingham, dated August 15, 1952, in the sum of \$15,000 was received by the Western Machinery Company.

Q. And state whether or not the \$15,000 credit on Exhibit A-8 was due to Western Machinery Company's receipt of that check.

A. Yes, Mr. Crosby.

Mr. Crosby: That's all the questions I have.

Mr. Shapro: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Crosby: Your Honor, the defendant rests its case.

The Court: The plaintiff may now proceed with its rebuttal.

Mr. Shapro: The plaintiff will recall, with the Court's permission, at this time Mr. Huckaba.

The Court: Come forward, Mr. Huckaba. You have already been sworn, Mr. Huckaba. You may resume the stand for further interrogation at this time in rebuttal. [237]

J. STANLEY HUCKABA

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

(Testimony of J. Stanley Huckaba.)

Direct Examination

By Mr. Shapro:

Q. Mr. Huckaba, do you recall the conversation you had with Mr. McMillan on February 22, 1952, which was the time the quotation and order, which is Plaintiff's Exhibit No. 1 in this case, was given to you by Mr. McMillan? Do you recall that situation and circumstance, or the occasion, do you recall that occasion?

A. The occasion on which the order was taken by myself?

Q. Yes.

A. From Northwestern Improvement Company?

Q. Yes. Do you understand my question? It's merely, do you recall that such an event happened?

A. Yes, I do.

Q. In that conversation and at the time you were given Plaintiff's Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you that he made——

Mr. Crosby: I object to that question——

Mr. Shapro: Just a moment.

The Court: Wait until the question is [238] finished and then if you wish to object, you may.

Mr. Shapro: May I have it read, your Honor? I'm sorry, I lost the——

The Court: You may read it, Mr. Reporter.

(Testimony of J. Stanley Huckaba.)

(The reporter read the question as follows:

“Q. In that conversation and at the time you were given Plaintiff’s Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you that he made”——)

Q. (By Mr. Shapro): Did Mr. McMillan tell you at that time that he made that change and gave you that order on the understanding that Bellingham Coal Mines Company would pay for that equipment?

Mr. Crosby: I object to that question as being leading, your Honor.

Mr. Shapro: If your Honor please, this is rebuttal. This is putting categorically to this witness the substance of the previous witnesses’ testimony.

Mr. Crosby: Your Honor, the question wasn’t framed in that manner. It was a leading question and [239] had no reference to any testimony in defendant’s case.

The Court: The objection is overruled. Read the question, please.

(The reporter read the question as follows:

“Q. In that conversation and at the time you were given Plaintiff’s Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you at that time that

(Testimony of J. Stanley Huckaba.)

he made that change and gave you that order on the understanding that Bellingham Coal Mines Company would pay for that equipment?"')

A. I do not recall that he did make such a statement.

Mr. Shapro: That's all.

Cross-Examination

By Mr. Crosby:

Q. Mr. Huckaba, you have no recollection one way or the other whether that statement was made, isn't that right?

A. I do not recall that it was made. [240]

Q. Mr. Huckaba, isn't it just that you don't have any recollection one way or the other about the statement?

Mr. Shapro: Your Honor, I think the question has already been asked and answered.

The Court: The objection is overruled.

A. That is correct.

Mr. Crosby: That's all the questions I have.

Mr. Shapro: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Shapro: The plaintiff will recall Mr. Barshell, your Honor.

The Court: Come forward. Resume the stand, Mr. Barshell. You have already been sworn.

EDWIN J. BARSHELL

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. Barshell, in your capacity as Controller of Western Machinery Company, have you anything to do with the collection of accounts and notes receivable? A. I have.

Q. And what is your connection with that? [241]

A. I supervise all accounting, all credit for the Western Machinery Company's entire organization.

Q. Does that include collections?

A. That includes the collection of accounts.

Q. Do you know, and if you will please answer the question yes or no as the case may be, do you know of your own knowledge why, between the due date of the Bellingham Coal Mines note, which was November 18, 1952, and the first week in March of 1953, no demands were made by Western Machinery Company upon Northwestern Improvement Company for the payment of any moneys on account of this coal washing plant?

Mr. Crosby: Your Honor, I object to the form of that question as leading.

The Court: Who said what as far as this witness is concerned?

Mr. Shapro: Your Honor, I'm not calling for

(Testimony of Edwin J. Barshell.)

a conversation at all. I'm calling for his answer yes or no as to whether he knows why, knows the reason for we'll call it the inactivity of Western Machinery Company toward Northwestern Improvement. Your Honor will recall Mr. McMillan testified yesterday that there was no demand made upon Northwestern Improvement Company to his knowledge by Western Machinery Company after the note became due up to the time he met me [242] in the San Francisco office of Western Machinery Company, which was the first week in March of 1953. My question at this moment is to ask this witness whether he knows the reason why that wasn't done.

Mr. Crosby: I submit, your Honor, that it is a leading question and it's improper rebuttal.

The Court: I do not see any reason why it would not be proper for him to state the reason why his concern did not do this, that or the other thing.

Mr. Shapro: That's what I'm asking him, or trying to.

The Court: The objection is overruled. Read the question so the witness will have it clearly in his mind.

(The reporter read the question as follows:

“Q. Do you know, and if you will please answer the question yes or no, as the case may be, do you know of your own knowledge why, between the due date of the Bellingham Coal Mines note, which was November 18, 1952, and

(Testimony of Edwin J. Barshell.)

the first week in March of 1953, no demands were made by Western Machinery Company upon [243] Northwestern Improvement Company for the payment of any moneys on account of this coal washing plant?")

The Court: Yes or no, please.

A. Yes.

Q. (By Mr. Shapro): Will you give the Court that reason?

Mr. Crosby: I object to the question, your Honor, as the answer would be entirely self-serving. It has only to do with the plaintiff's internal policy and is entirely self-serving. It is an improper question.

The Court: Mr. Shapro, what is there that has been developed as a part of defendant's case not previously gone into by plaintiff which inspires this particular question?

Mr. Shapro: The thing that inspires it, the testimony, your Honor, that inspires this question is what I referred to a few moments ago, the testimony of Mr. McMillan that Northwestern Improvement Company received no demands whatever after the note was given until he met me in San Francisco in the first week in March of 1953, and I want to show by this witness in rebuttal the reason why no such demands were made. I think that is perfectly proper rebuttal. [244]

The Court: I will hear from opposing Counsel.

Mr. Crosby: Your Honor, I feel the only type of rebuttal that would be proper is if they denied

(Testimony of Edwin J. Barshell.)

such a fact and not as to why such a fact is true.

The Court: The objection is overruled.

A. The reason why no demand was made upon Northwestern Improvement was our knowledge of the solvency of Northwestern Improvement, the fact that we had the order from Northwestern Improvement upon which we relied for the collection of the account, and a business reason: The Northwestern Improvement was a large user of coal washing equipment and we did not wish to embarrass them.

Q. (By Mr. Shapro): Mr. Barshell, do you recall the conversation that you had by telephone with Mr. Little some few days or so before you received the note from him with his letter of August 23rd?

A. I do, very well, Mr. Shapro.

Q. Will you tell the Court, please, the circumstances of that call? First, who made it and where you were, where he was and what happened.

A. It is my recollection that Mr. Little called me with regard to the account.

Q. Will you give the Court substantially what he said and [245] what you said in that telephone conversation?

A. The question of a contract of conditional sale or a chattel mortgage was brought up.

Q. By whom? A. By Mr. Little.

Q. What did he say about it?

A. It was in connection with the fact that a chattel mortgage or a contract of conditional sale

(Testimony of Edwin J. Barshell.)

would be embarrassing by reason of an application for an R. F. C. loan. A note was suggested.

Q. By whom? A. I believe by Mr. Little.

Q. All right.

A. And I told Mr. Little that I would accept the note.

Q. Was there anything in that conversation concerning the release of Northwestern Improvement Company?

A. There was never anything said about releasing Northwestern Improvement Company.

Q. Was there anything said, Mr. Barshell, by Mr. Little or by you in connection with this matter concerning Northwestern Improvement Company?

Mr. Crosby: I object to that question as being leading.

The Court: You asked concerning——

Mr. Shapro: Concerning Northwestern [246] Improvement Company.

The Court: The objection is overruled.

A. There was nothing said about or concerning Northwestern Improvement Company.

Mr. Shapro: Your Honor, we have almost reached the end of the case. Could we have a couple of moments to confer?

The Court: Yes, you may.

Mr. Shapro: Thank you.

(Brief pause.)

Mr. Shapro: I have no further questions of this witness, your Honor.

(Testimony of Edwin J. Barshell.)

Cross-Examination

By Mr. Crosby:

Q. Mr. Barshell, it is true, isn't it, that prior to your telephone conversation with Mr. Little where you agreed to accept a note that the Western Machinery Company either through yourself or some other representative requested that the Bellingham Coal Mines Company give a conditional sale agreement or a mortgage covering the equipment which was shipped to the Bellingham Coal Mines Company?

A. It was not done by me prior to that conversation.

Q. Well, during that conversation? [247]

A. No, I thought you said prior to that time I talked to Mr. Little.

Q. At any time. At any time, Mr. Barshell, did you or any representative of the Western Machinery Company request a conditional sales contract or mortgage from Bellingham Coal Mines Company covering the machinery which was delivered to Bellingham?

A. There may have been, Mr. Crosby. I believe there was.

Q. Now, in connection with a chattel mortgage, isn't it true that you would also have had to take a promissory note which would be covered by the chattel mortgage?

Mr. Shapro: I object to that, if your Honor

(Testimony of Edwin J. Barshell.)

please, on the grounds it's calling for the opinion and conclusion of the witness.

The Court: The objection is overruled.

A. I may be wrong but I have seen chattel mortgages that didn't have notes attached.

Q. (By Mr. Crosby): The Western Machinery Company was wanting collateral, additional collateral to place with its bank, the American Trust Company, wasn't it?

A. May I say here that the American Trust Company did not need the obligation reflected by a chattel mortgage or a note to obtain funds from the American Trust Company?

The Court: Whom do you mean?

A. For the Western Machinery Company [248] to obtain collateral for use at the bank.

Mr. Crosby: I have no further questions.

Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, did the cash or capital position of Western Machinery Company in August of 1952 require collateral or the immediate security for this obligation or account of Northwestern Improvement Company?

A. It did not then and it does not now.

Mr. Shapro: I have no further questions.

The Court: Anything else?

Mr. Crosby: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Do both sides rest?

Mr. Shapro: Your Honor, I have three documents, three letters that I would like to have marked. I think Counsel will stipulate that they may be received in evidence.

The Clerk: Plaintiff's Exhibits 9, 10 and 11.

(Letter, dated August 19, 1953, from Herbert S. Little to Arthur P. Shapro, was marked Plaintiff's Exhibit No. 9 for [249] identification.)

(Copy of letter, dated August 13, 1953, from Arthur P. Shapro to Herbert S. Little, was marked Plaintiff's Exhibit No. 10 for identification.)

(Letter, dated April 6, 1953, from Shapro & Rothschild to Northwestern Improvement Co., and copy of letter, dated April 6, 1953, from Shapro & Rothschild to Herbert S. Little, was marked Plaintiff's Exhibit No. 11 for identification.)

Mr. Shapro: Your Honor, Counsel for the defendant will, I understand, stipulate to the fact that the original of a letter from me, dated April 6th, addressed to Northwestern Improvement Company, together with the enclosed copy of a letter of even date, April 6, '53, to Messrs. Little, LeSourd, Palmer & Scott, was received by Northwestern Improvement Company. Is that correct?

Mr. Crosby: That is correct.

Mr. Shapro: At this time then we offer in evidence as part of the plaintiff's case in rebuttal the letters marked Plaintiff's Exhibit No. 11 for identification.

The Court: Is that the right one that you mentioned? Did you see it, Mr. Crosby, and is that the right one? Is that the right exhibit? [250]

Mr. Crosby: That is the right exhibit, your Honor.

The Court: It is admitted——

Mr. Crosby: Your Honor——

The Court: Do you have an objection?

Mr. Crosby: I was stipulating to the fact that the letter was received by the Northwestern Improvement Company, but not as to its admissibility, your Honor.

The Court: What is your objection to it?

Mr. Crosby: The letter which is marked Plaintiff's Exhibit 11 from Mr. Shapro to Northwestern Improvement Company purports to state the position of the Western Machinery Company in connection with the promissory note which had been delivered by Bellingham Coal Mines Company several months prior to the sending of this letter, and, therefore, it is immaterial as to Western Machinery Company's position at the time of April the 6th on that note which was given to Western Machinery Company many months prior to that time.

The Court: Did your client respond to it?

Mr. Shapro: They did not, your Honor.

Mr. Crosby: Well, now, I do not know at the present time.

The Court: You are not admitting that. I [251] thought maybe you might have a letter, though, and if you had you might wish to——

Mr. Crosby: Your Honor, I will check for just a moment and——

The Court: You don't need to do that. I just thought you might have at your hand the answer to the letter.

Mr. Crosby: It may be, your Honor, if I may have a second to check my file.

The Court: The Court will suspend ruling, but every minute you take now will be taken away from the time for argument.

(Brief pause.)

Mr. Crosby: I'm not able to state positively one way or the other, your Honor.

Mr. Shapro: I submit, your Honor, in support of its admissibility it is in effect a demand, a renewed demand for payment of the account of Northwestern Improvement Company.

The Court: The Court will not consider any argument in the letter. It will only be for the purpose of showing an act done. The Court will consider no attorney's arguments.

Mr. Shapro: It wasn't offered for that purpose, your Honor. [252]

The Court: That exhibit is admitted, the objections being overruled.

(Plaintiff's Exhibit No. 11 for identification was admitted in evidence.)

Mr. Shapro: And I understand, your Honor, that Counsel for the defendant will stipulate that his client, Northwestern Improvement Company, received a copy of a letter from me to Messrs. Little, LeSourd, Palmer & Scott, dated August 13, 1953, which has been marked Plaintiff's Exhibit 10 for identification.

The Court: Have you seen these before, Mr. Crosby?

Mr. Crosby: Yes, your Honor, I have.

The Court: And did you know that he intended on certain conditions to make use of them in the trial?

Mr. Crosby: Yes, your Honor, and I advised him at that time that I would object to the admissibility of the letters. Your Honor, in connection with Plaintiff's Exhibit 10, I object to the admissibility of this letter on the grounds that it is correspondence between Mr. Shapro and a third party who is not a party to this lawsuit; that it can have no effect upon the defendant in this case. It is true that a copy was received by the defendant, but it is correspondence between Mr. Shapro and a third party and there was no [253] duty upon the defendant in this case to do anything as the result of receiving a copy of correspondence to another party.

Mr. Shapro: It is not offered to show any lack of duty or the failure to perform any duty, it is offered solely for the purpose of showing that the

defendant was advised of the position we were taking with respect to this claim on August 13, 1953.

The Court: The objection is sustained and that offer is rejected.

(Plaintiff's Exhibit No. 10 for identification was refused.)

Mr. Shapro: Then before offering Plaintiff's Exhibit No. 9, as an adverse witness the plaintiff recalls Mr. McMillan.

The Court: Mr. McMillan is called as an adverse witness in rebuttal. You have already been sworn. You may take the stand, Mr. McMillan.

EARL R. McMILLAN

recalled as an adverse witness by plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. McMillan, on or about August 13, 1953, do you recall [254] having any telephone or personal conversation with Mr. Little concerning a letter of mine of that date?

A. I have no recollection at this moment, no, sir.

Q. Do you recall at any time in the month of August, 1953, requesting Mr. Herbert S. Little to ask that any action by Western Machinery Company against Northwestern Improvement Company

(Testimony of Earl R. McMillan.)

in this case be postponed until your return? You were then starting on a trip.

A. I don't—I'm not familiar with the subject of your letter. I don't know what you're talking about.

Mr. Shapro: May the letter, marked Plaintiff's Exhibit No. 9, be shown to the witness, your Honor?

The Court: It may be.

(Plaintiff's Exhibit No. 9 for identification was handed the witness.)

Q. (By Mr. Shapro): Mr. McMillan.

A. Yes, sir.

Q. Having read the letter which has been marked for identification Plaintiff's Exhibit No. 9, is your recollection or memory refreshed with respect to any such conversation as I have just interrogated you concerning?

A. Yes, sir, I have some recollection of that.

Mr. Shapro: May the witness be shown. [255] Plaintiff's Exhibit 10, your Honor, the one that was just rejected?

The Court: He may.

(The exhibit was handed the witness.)

The Court: I suggest to Counsel on both sides that you do everything you can to expedite this case. We have to finish this case by 4:00 o'clock, arguments and all.

Mr. Shapro: Yes, your Honor.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Shapro): Mr. McMillan, will you read Exhibit 10, please?

(Brief pause.)

Q. Mr. McMillan, was the substance of the letter which is marked Plaintiff's Exhibit 10 discussed with you at or about the date of that letter by Mr. Little?

A. I have no recollection of any discussion of this subject matter.

Q. You have no recollection of any discussion?

A. No, sir.

Q. Do you have any recollection of the discussion that is referred to in Exhibit No. 9?

A. Yes, sir.

Q. But it did not so far as you recall concern the letter of August 13th, which is No. 10?

A. I do not connect them, no, sir. [256]

Q. I see.

Mr. Shapro: Now, may the witness be shown just one more item, your Honor, Plaintiff's Exhibit No. 2?

The Court: He may.

(The exhibit was handed the witness.)

Q. (By Mr. Shapro): Would you read, Mr. McMillan, the second paragraph of Plaintiff's Exhibit No. 2, beginning with the words, "As you know"?

(Brief pause.)

(Testimony of Earl R. McMillan.)

A. Yes, sir.

Q. If, as you testified this morning, you told Mr. Huckaba that your signing for Northwestern Improvement Company, Plaintiff's Exhibit 1, the quotation and order, was subject to the understanding that the bill would be paid by Bellingham Coal Mines Company, why didn't you so qualify your confirmation of that letter in your letter of February 25, 1952?

A. That certainly was my intention in writing that letter as I did.

Q. But, by reading the letter, you don't find any such qualification, do you, sir?

A. I certainly do.

Q. A qualification as to the liability? Show it to me, sir, or show it to the court, rather. [257]

A. I start off by saying "As you know," which he did know.

Q. All right.

A. "* * * this equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager, and as such has been duly authorized by the former to purchase this equipment."

Q. Read on, please.

A. "This arrangement, of course, makes unnecessary any investigation on your part as to the financial responsibility of the Bellingham Coal Mines Company, which as you know is a newly organized corporation. I might add, however, for your infor-

(Testimony of Earl R. McMillan.)

mation, that the latter company is adequately financed and fully responsible for any commitments they make make at this time.”

Q. When you wrote that letter——

The Court: Who was the latter company?

A. Beg your pardon, sir?

The Court: Who was the latter company?

Mr. Shapro: The Bellingham Coal Mines Company.

The Witness: The Bellingham Coal Mines Company. [258]

Q. (By Mr. Shapro): When you wrote that letter which is Plaintiff's Exhibit No. 2 and particularly the part that you have just read to the Court, Mr. McMillan, isn't it a fact that you knew and that you intended by that letter to pledge the credit of Northwestern Improvement Company to Western Machinery Company?

A. Absolutely no, sir.

Mr. Shapro: That's all.

Mr. Crosby: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Shapro: May I at this time, your Honor, offer in evidence Plaintiff's Exhibit No. 9? That is the letter that the witness McMillan said he recognized the contents of.

Mr. Crosby: Your Honor, I object to that letter on the same ground as Plaintiff's Exhibit No. 10

which was rejected. The letter is from Mr. Little, a person who is not a party to this action, to Mr. Shapro, and that the defendant can in no way be bound by the contents of that letter. It is not written on behalf of them, and it has no material bearing on the issues in this case.

Mr. Shapro: It quotes Mr. McMillan, your [259] Honor. It quotes Mr. McMillan, and Mr. McMillan identified the fact that he was familiar with that transaction.

The Court: Was this brought to Mr. McMillan's attention?

Mr. Shapro: Yes, when he was on the stand, your Honor.

The Court: No, I mean before he was on the stand.

Mr. Shapro: No, not before he was on the stand, your Honor, no it was not.

The Court: I am inclined to think that the objection to this is well taken. It is finally the opinion of the Court that if that was not brought to Mr. McMillan's attention that he is not bound by it and should not have to be confronted with it at this time when he is acting in the capacity of a witness, even though he was as important an actor as he was in the transactions involved here. The objections are sustained to Plaintiff's Exhibit 9 and the offer of it is rejected.

(Plaintiff's Exhibit No. 9 for identification was refused.)

Mr. Shapro: The plaintiff's rebuttal is closed, your Honor. [260]

The Court: Does the plaintiff rest?

Mr. Shapro: Yes, your Honor.

The Court: Does the defendant rest?

Mr. Crosby: Yes, your Honor.

Mr. Shapro: Your Honor, so that Counsel will be informed, the plaintiff will waive the opening argument.

The Court: Very well. Court will be at recess for approximately five minutes.

(Short recess.)

The Court: All are present. You may proceed.

Mr. Crosby: Your Honor, after your Honor left the bench we advised the clerk that we felt that we would each like to have a minimum of one hour to argue the case and——

The Court: I am sorry, I can't give you but thirty minutes. You may proceed to argue. I am very sorry. We have been at this case all week, you should have saved some time for argument. You may select as much of the time as you wish for rebuttal of your thirty minutes. I have to stop the argument at four o'clock.

Mr. Shapro: Your Honor, the plaintiff waives its opening argument.

The Court: You may proceed, Mr. Crosby. [261]

(Thereupon, Mr. Crosby presented oral argument to the Court in behalf of defendant, followed by oral argument by Mr. Shapro in behalf of plaintiff.) [262]

Reporter's Certificate

I, George F. Cropp, do hereby certify that I am an Official Court Reporter for the above-entitled Court, and that as such was in attendance upon and reported the hearing of the foregoing matter.

I further certify that the foregoing transcript is a true and correct record of the proceedings had upon the hearing of said cause.

Dated at Seattle, Washington, this 25th day of July, 1956.

/s/ GEORGE F. CROPP,
Official Court Reporter.

[Endorsed]: Filed August 10, 1956. [263]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith, the following original papers in the file dealing with the action together with exhibits as the

record on appeal herein to the United States Court of Appeals at San Francisco, to wit:

1. Complaint, filed Feb. 9, 1955.
2. Marshal's return on summons, filed Feb. 15, 1955.
3. Answer of defendant, filed Feb. 28, 1955.
4. Motion of defendant to amend answer, filed April 3, 1956.
5. Affidavit of Roger J. Crosby, filed April 3, 1956.
6. Motion of defendant for Production of Documents, filed April 3, 1956.
7. Notice of Association of Counsel, filed April 9, 1956.
8. Supplement of defendant to Motion for Production of Documents, filed April 9, 1956.
9. Notice of Plaintiff's Taking of Deposition Upon Oral Examination of Earl McMillan, filed April 12, 1956.
10. Praecipe, for subpoenas duces tecum, Northwestern Improvement Co. and 3, filed April 12, 1956.
11. Stipulation for Amended Answer, etc., filed April 12, 1956.
12. Amended Answer of Defendant, filed April 12, 1956.
13. Deposition of L. W. T. May on behalf of defendant, filed April 14, 1956. (Exhibits 1 through 7 inclusive)
14. Marshal's return on subpoenas duces tecum, Dean Eastman and 2, filed April 20, 1956.
15. Marshal's return on deposition subpoena

duces tecum, Northern Pacific Railway, filed April 20, 1956.

16. Motion of defendant to Amend Answer, filed May 22, 1956.

17. Affidavit of Roger J. Crosby, filed May 22, 1956.

18. Order Denying Defendant's Motion to File Second Amended Answer, filed May 31, 1956.

19. Plaintiff's Memorandum of Authorities, filed June 15, 1956.

20. Defendant's Memorandum of Authorities, filed June 15, 1956.

21. Findings of Fact and Conclusions of Law, filed June 22, 1956.

22. Oral Opinion of Court for June 15, 1956, filed June 25, 1956.

23. Judgment, filed June 22, 1956.

24. Notice of Appeal, filed July 16, 1956.

25. Cost Bond on Appeal, filed July 16, 1956.

26. Order Directing Transmission of Original Exhibits, filed July 20, 1956.

27. Designation of Record on Appeal, filed July 20, 1956.

Plaintiff's Exhibits 1 through 11, inclusive.

Defendant's Exhibits A-1 through A-19, inclusive.

28. Statement of Facts (Court Reporter's Transcript of Proceedings) filed Aug. 10, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the

appellant for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, \$5.00; and that said amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 16th day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15238. United States Court of Appeals for the Ninth Circuit. Western Machinery Company, a Corporation, Appellant, vs. Northwestern Improvement Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 17, 1956.

Docketed: August 22, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15238

WESTERN MACHINERY COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Appellee.

STATEMENT OF POINTS ON
WHICH APPELLANT RELIES

Statement of points on which appellant relies:

1. Error of the district court in making the following finding of fact which the evidence before the court does not support:

“II.

“That plaintiff sold and delivered coal-wash-machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as Plaintiff’s Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in

evidence as Plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant."

Instead of finding II, the district court should have found under the evidence that defendant purchased the coal-washing machinery on its own account.

2. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"III.

"That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2."

Instead of said finding, the district court should have found under the evidence that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff, as purchaser and not as surety, to pay the purchase price.

3. Error of the district court in making the following finding of fact which the evidence before the court does not support:

“IV.

“That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant’s assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with Plaintiff’s Exhibits 1 and 2 was without consideration to defendant.”

Instead of said finding, the district court should have found that defendant received consideration as purchaser of the coal-washing plant or that if Bellingham Coal Mines Co. was purchaser of said coal-washing plant that defendant became surety, sharing, however, in the consideration running to Bellingham Coal Mines Co. and also receiving an independent consideration.

4. Error of the district court in making the following finding of fact which the evidence before the court does not support, except those portions specifying the original purchase price, the dates and amounts of payments, the payor, payee, and the unpaid balance, which are correct and in accordance with the evidence:

“V.

“That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum of \$71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid \$15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of \$7,593.24, leaving \$48,445.47 unpaid.”

Instead of the objectionable portions of said finding, the district court should have found that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety; and further that said account was not due and payable until the installation of the coal-washing plant was completed and accepted.

5. Error of the district court in making the following portion of finding VI which the evidence before the court does not support:

“* * * The Court finds that no additional consideration in fact was paid or received by defendant on account of, and the defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note.”

Instead of said portion of finding VI, the court should have found that defendant received consideration for the execution of the promissory note by Bellingham Coal Mines Company and its delivery to plaintiff; that the manager of coal operations of defendant had actual and apparent authority to consent to and to approve on behalf of defendant said execution and delivery of said note; that defendant in fact had actual knowledge of, acquiesced in, consented to and approved said execution and delivery of said note.

6. Error of the district court in making the following portion of finding VII which evidence before the court does not support:

“* * * that by said promissory note, plaintiff extended to Bellingham Coal Mines Company, without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952.”

Instead of said portion of finding VII, the district court should have found that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

7. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

“II.

“That plaintiff sustained the burden of proof, to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of \$71,038.71 to Bellingham Coal Mines Company in accordance with Plaintiff’s Exhibits 1, 2 and 4, for which defendant became a surety to plaintiff for the sum of \$71,038.71; that there is presently due and owing \$48,445.47 of the amount for which defendant was surety.”

Instead of said conclusion, the district court should have entered its conclusion of law that the plaintiff sustained the burden of proving that it sold goods, wares and merchandise of the agreed and reasonable value of \$71,038.71 to defendant, and that defendant is presently indebted to plaintiff in the amount of \$48,445.47.

8. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

“III.

“That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952.”

9. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

“IV.

“That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff’s complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff.”

Instead of said conclusion, the district court should have entered its conclusion of law that if in fact defendant was a surety, it shared in the consideration running to Bellingham Coal Mines Company and also received an independent consideration therefor.

10. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

“VI.

“That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff’s complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant’s principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation

defendant was a surety, thereby discharging the defendant from its obligation as surety.”

Instead of said conclusion, the district court should have entered its conclusion of law that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

11. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

“VII.

“That a judgment and decree should be entered herein, dismissing all counts of plaintiff’s complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein.”

Instead of said conclusion, the district court should have entered its conclusion of law that plaintiff is entitled to judgment against defendant in the amount of \$48,445.47, and for its costs and disbursements.

12. Error of the district court in entering judgment dismissing all counts of plaintiff's complaint with prejudice and with costs to defendant. Instead thereof, the district court should have rendered judgment for plaintiff against defendant in the amount of \$48,445.47 plus legal interest and for plaintiff's costs and disbursements incurred.

Dated this 22nd day of August, 1956.

SHAPRO & ROTHSCHILD and

KARR, TUTTLE &

CAMPBELL,

Attorneys for Appellant.

By /s/ CARL G. KOCH,

By /s/ HOWARD I. TUTTLE.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1956.

